

(23,429)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 854.

LIZZIE M. TROXELL, ADMINISTRATRIX OF THE ESTATE
OF JOSEPH DANIEL TROXELL, DECEASED, PLAINTIFF
IN ERROR,

vs.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD
COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.

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DOCKET ENTRIES.

OCTOBER SESSION, 1910.

George Demming Lizzie M. Troxell, Administratrix
of the Estate of Joseph Daniel
Troxell, and a citizen of the
State of New Jersey,

1220

vs.

James F. Campbell The Delaware, Lackawanna and
Western Railroad Company, a
corporation of the State of
Pennsylvania.

1910 December 29 Praeceptum for summons filed.
Summons returnable the first
Monday of January next.
Statement of Claim filed.

1911 January 3 Summons returned "served" and
filed.

" " 14 Order for the appearance of
James F. Campbell, Esquire,
for defendant filed.
Plea filed.

" " 19 Order to place case on trial list
filed.

" " 26 Petition to strike off plea filed.
Order granting rule on defendant
to show cause why plea should
not be stricken off filed.

" February 6 Answer of defendant to petition
for rule to strike off plea.
Argued.

" March 2 Opinion, Holland, J., overruling
motion to strike off plea of *res
judicata* filed.

Docket Entries.

- “ “ 3 Order of Court entering judgment for defendant on plaintiff's motion to strike off plea of *res judicata* filed. Judgment accordingly.
 Order granting exception to plaintiff, &c., filed.
 Assignment of error filed.
 Petition for writ of error filed.
 Order allowing writ of error filed.
- “ “ 7 Bond sur writ of error filed.
 Order approving bond sur writ of error filed.
 Writ of error allowed and copy thereof lodged in Clerk's office for adverse party.
 Citation allowed and issued.
 Citation returned “service accepted” and filed.
- 1911 March 7 Praeipie for transcript of record sur writ of error filed.
- “ “ 16 Transcript of record sur writ of error transmitted to Clerk of U. S. C. C. of Appeals.
- “ April 13 Certified copy of Order in U. S. Circuit Court of Appeals for the Third Circuit dismissing writ of error filed.
- “ June 7 Order to place case on trial list filed.
- “ October 26 Petition for rule to show cause why case should not be stricken from trial list filed.
 Order granting rule to show cause why case should not be stricken from trial list filed (returnable October 27, 1911, at 10 A. M.).

Docket Entries.

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- “ “ 27 Plaintiff's answer to petition to strike case from trial list filed.
- “ “ 27 Order refusing rule to strike case from trial list filed.
- “ November 13 And now to wit a jury being called come to wit (see minutes).
- “ “ 16 And the jurors aforesaid upon their oaths and affirmations respectively do say that they find for plaintiff and assess the damages at Ten Thousand one hundred ninety-six and 50/100 (\$10,196.50) Dollars.
Plaintiff's witness bill filed.
- “ “ 20 Defendant's bill of costs filed.
Motion for judgment *non obstante veredicto* filed.
Motion and reasons for new trial filed.
- 1912 January 8 Argued.
- “ March 29 Opinion, Holland, J., refusing motion for judgment *non obstante veredicto* and overruling motion for new trial filed.
- “ April 1 Praeceptum for judgment filed.
Judgment accordingly.
Bill of Exceptions filed.
- 1912 April 1 Order granting exception to defendant filed.
- “ “ 4 Assignments of error filed.
Petition for writ of error filed.
Order allowing petition for writ of error filed.
Writ of Error allowed and copy thereof lodged in Clerk's office for adverse party.
Bond sur writ of error in the sum

Writ of Error.

of Twenty Thousand (\$20,000)
Dollars filed.

Order approving bond sur writ
of error filed.

Citation allowed and issued.

“ “ 6 Citation returned “service ac-
cepted” and filed.

“ “ 8 Praecept sur transcript of record
sur writ of error filed.

UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES,

*To the Honorable the Judges of the District Court
of the United States for the Eastern District of
Pennsylvania,*

Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you between Lizzie M. Troxell, Administratrix, Plaintiff, and The Delaware, Lackawanna and Western Railroad Company, Defendant, a manifest error hath happened, to the great damage of the said The Delaware, Lackawanna and Western Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia within thirty days, in the said United

States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable the Judges of the District
(Seal) Court of the United States, at Philadelphia,
the 4th day of April in the year of our Lord
one thousand nine hundred and twelve.

GEORGE BRODBECK,
*Deputy Clerk of the District Court
of the United States.*

Before HOLLAND, J.

Allowed—

BY THE COURT.

Attest—

GEORGE BRODBECK,
Deputy Clerk.

PLAINTIFF'S STATEMENT OF CLAIM.

Filed Dec. 29, 1910.

The plaintiff, Lizzie M. Troxell, administratrix of the estate of Joseph Daniel Troxell, and a citizen of the State of New Jersey, claims of the defendant, The Delaware, Lackawanna and Western Railroad Company, a corporation incorporated under certain Acts of the Legislature of the State of Pennsylvania, the sum of fifty thousand dollars (\$50,000) as damages, which sum is justly due and payable to the plaintiff by

Plaintiff's Statement of Claim.

the defendant upon the cause of action of which the following is a statement:

The plaintiff, Lizzie M. Troxell, as administratrix of said estate, brings this action for the benefit of Lizzie M. Troxell, widow, and Willard Daniel Troxell, about four years of age, and Vera Louisa Troxell, about two years of age, the two children, surviving, of Joseph Daniel Troxell, in accordance with the provisions of the Act of Congress, approved April 22, 1908, and its Amendment of April 5, 1910.

The defendant, The Delaware, Lackawanna and Western Railroad Company, is a common carrier corporation, engaged in the business of transportation, both of freight and passengers, and of interstate and foreign commerce, and is incorporated for this purpose under certain Acts of the Legislature of the State of Pennsylvania.

On or about the 21st day of July, 1908, said Joseph Daniel Troxell, the husband of said widow, Lizzie M. Troxell, and father of said children, was employed by said defendant corporation in the capacity of fireman on a locomotive, pulling and hauling one of said defendant's trains, carrying interstate and foreign commerce and traffic, and on and about the cars, tracks, roadbed and right of way used and employed by said defendant in its interstate and foreign commerce and traffic, and more particularly on and about the Banger and Portland Railroad Company, owned, controlled, operated and directed by said defendant, as one of its divisions, at and near the town of Belfast, Northampton County, Pennsylvania.

While said Joseph Daniel Troxell, on and about said date, was engaged in the proper, careful and necessary performance of his duties as fireman of the locomotive of said train, without any negligence or carelessness whatsoever on his part, and due entirely to the negligence, carelessness and oversight of said defendant, and its failure to supply and keep in good,

efficient condition, proper, necessary and safe devices, instruments, appliances and apparatus, said locomotive and train came into violent collision with several loose and runaway cars, causing a wreck, whereby and wherein said Joseph Daniel Troxell lost his life.

By reason of the death and killing of said Joseph Daniel Troxell, said widow and her children are deprived of the fellowship and companionship of her husband, are robbed and deprived of his support and maintenance for all time to come, and said widow is put to great loss for funeral expenses and otherwise, thrown absolutely on her own resources and efforts for a livelihood for herself and her children, and altogether damaged in the sum of fifty thousand dollars (\$50,000), as above set out.

Wherefore plaintiff brings this suit.

GEORGE DEMMING,
Attorney pro Plaintiff.

PLEAS.

Filed Jan. 14, 1911.

Defendant pleads "Not Guilty".

Defendant further pleads "*Res Judicata*" (in that an action brought by Lizzie M. Troxell, for the benefit of herself and children, vs. Delaware, Lackawanna and Western Railroad Company, to recover damages for the alleged wrongful death of her husband, Joseph Daniel Troxell, in this court, as of April Sessions, 1909, No. 694, was upon the same cause of action, wrong and injury, as is alleged in the statement of claim in this present suit, and that upon the trial thereof in this

court, there was a verdict rendered for the plaintiff, upon which judgment was entered, which was in due time appealed to the Circuit Court of Appeals for the Third Circuit, and by that court reversed, with an order that judgment *non obstante veredicto* be entered therein for the defendant, and that this reversal was upon the merits of the said cause).

JAMES F. CAMPBELL,
Attorney for Defendant.

**PETITION FOR RULE TO SHOW CAUSE WHY
CASE SHOULD NOT BE STRICKEN FROM THE
TRIAL LIST.**

Filed Oct. 26, 1911.

STATE OF PENNSYLVANIA, } ss.
COUNTY OF LACKAWANNA, }

F. M. Nowell, being duly sworn according to law, deposes and says that he is superintendent for the defendant in the above-entitled case, and as such is duly empowered to make this affidavit; that in the above-entitled case defendant filed its plea of "*Res Judicata*", and that plaintiff has never filed any replication or answer to said plea, and that plaintiff has not had said plea stricken off; that notwithstanding the existence of said plea of "*Res Judicata*", unreplicated, said plaintiff has ordered said case placed upon the trial list for the present term of your Honorable Court, and said case now appears on said trial list for November 13, 1911; that the venire for the jury to try all cases upon said trial list has gone forth; that

said case was and is improperly placed upon said trial list because said plea of "*Res Judicata*" remains unrelieved to as heretofore set forth, and that said case cannot be tried according to law with the pleadings therein in the status in which the same now are.

Wherefore, deponent, on behalf of the above-entitled defendant, prays that your Honorable Court grant a Rule on the above-entitled plaintiff to show cause why said case should not be stricken from said trial list.

F. M. NOWELL,
Sup't.

Sworn to and subscribed before me this 25th day of October, A. D. 1911.

EUGENE DIEHL,
(Seal) *Notary Public.*
My commission expires Jan. 16, 1915.

ORDER.

Before HOLLAND, J.

And now, to wit, October 26th, 1911, upon consideration of the foregoing petition, and on motion of James F. Campbell, Esq., attorney for defendant, the Court grants a Rule on the above-entitled plaintiff to show cause why the above-entitled case should not be stricken from the trial list.

Rule returnable October 27, 1911, at 10 o'clock A. M.

BY THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

**ANSWER TO DEFENDANT'S PETITION FOR
RULE TO SHOW CAUSE WHY CASE SHOULD
NOT BE STRICKEN FROM THE TRIAL LIST.**

Filed Oct. 27, 1911.

Lizzie M. Troxell, the plaintiff, through her counsel, George Demming, Esq., for answer to defendant's petition states as follows:

Defendant's petition was only served upon her counsel at five-thirty P. M. yesterday afternoon, October 26th. Her case is down for trial on November 13th, barely two weeks off, the trial list has been out, served upon and known to the defendant, since October 2nd, and the preliminary list two weeks before that; yet defendant has seen fit to take this petition at this late hour.

Plaintiff has not filed, and can not file, a replication to the plea of defendant of "*Res Judicata*", because, under the proper practice in Pennsylvania, to which the Federal Courts here located are bound to conform, there is no such plea. Plaintiff took a rule to strike off this plea of "*Res Judicata*", and if plaintiff filed a replication to this plea she would thereby accede to the plea and waive her rights to object to the same.

On the other hand, defendant's plea of "Not Guilty", filed at the same time, under the practice in Pennsylvania, is the plea of general issue, puts the case at issue, and under it the defendant, if it so chooses, can prove "*Res Judicata*", or any other defence, as the decisions of *Zion Church vs. Light*, 7 Sup. Court, 223; *Johnson vs. Phila. and Reading Rwy. Co.*, 163 Pa. 127, and other decisions plainly show: The plea of "*Res Judicata*" filed by defendant is improper, and should have been stricken off by the Court. Not having been stricken off, it can be regarded as mere surplusage, as the case is at issue upon the gen-

Order of Court.

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eral and proper plea filed by defendant of "Not Guilty", and defendant is in no way prejudiced or embarrassed thereby.

GEORGE DEMMING,
Attorney for Plaintiff.
October 27, 1911.

ORDER OF COURT.

Filed Oct. 27, 1911.

Before HOLLAND, J.

And now, to wit, this 27th day of October, 1911, it is

Ordered that the Rule to strike the above case from the October Session Trial List, set for November 13th, be and the same is hereby refused.

BY THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

BILL OF EXCEPTIONS.

Be it remembered, that in the said term of October, 1910, came the said plaintiff into the said Court, and impleaded the said defendant in a certain plea of trespass, &c., in which the said plaintiff declared (prout narr.) and the said defendant pleaded (prout pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of said Court, held at the County aforesaid before the Honorable James B. Holland, Judge of the said Court, the 13th, 14th and 15th days of November, 1911, the aforesaid issue between the said parties came to be tried by a jury of the said County for that purpose duly impaneled (prout list of jurors), at which day came as well

the said plaintiff as the said defendant by their respective attorneys; and the jurors of the jury aforesaid impaneled to try the said issue, being also called, came, and were then and there in due manner chosen and sworn or affirmed, to try the said issue; and upon the trial the counsel of the said Lizzie M. Troxell called the following named witnesses, and produced the following evidence (prout evidence offered by plaintiff, as shown by the stenographer's transcript filed herewith); and thereupon the defendant offered the following evidence (prout evidence offered by defendant, as shown by the stenographer's transcript filed herewith); which was all the evidence presented by both sides, and thereupon the Court charged the jury as follows: (prout charge of the Court, as shown by the stenographer's transcript filed herewith and approved by the Court).

Before HON. JAMES B. HOLLAND, J., and a Jury.

Philadelphia, Monday, December 13th, 1911.

Present:

GEORGE DEMMING, Esq., for Plaintiff;
JAMES F. CAMPBELL, Esq., and J. H. OLIVER,
Esq., for Defendant.

Transcript of testimony, rulings of the court,
charge of the court, and exceptions.

MR. CAMPBELL: If your Honor please, before the jury is sworn, I desire to make a motion and have it put upon the record.

As this case is not at issue I formally object to a trial of the case now.

(Motion objected to.)

(Motion overruled.)

(Exception noted for defendant by direction of the court.)

MR. CAMPBELL: I offer in evidence the record of the previous trial of the case of Lizzie M. Troxell, a resident of the State of New Jersey, versus the Delaware, Lackawanna and Western Railroad Company, a corporation organized under the laws of the State of Pennsylvania, April Sessions, 1909, No. 694, in which there was a verdict in this court and a reversal in the Circuit Court of Appeals, and I object to the trial of this case because this proceeding has already been adjudicated.

(Objected to.)

(Objection sustained.)

(Exception noted for defendant by direction of the court.)

The jury was then sworn and affirmed.

MR. CAMPBELL: If the court please, I also move for the dismissal of this cause for the reason that Lizzie M. Troxell, as the widow of Joseph Daniel Troxell, brought a case against this defendant and proved that at the time he was engaged in both intra-state and interstate traffic, and your Honor held in an opinion in that case that there was a concurrent remedy, that is, the widow could proceed in a case of that kind under the state law or the administratrix could sue under the Federal Employers' Liability Act, and for that reason the widow, having lost her action under the State law, she is concluded from bringing an action as administratrix, and I ask that this present case be dismissed on that ground.

THE COURT: There is not any evidence of that yet.

MR. CAMPBELL: The record shows it.

THE COURT: The record is not in.

(Motion objected to.)

(Motion overruled.)

(Exception noted for defendant by direction of the court.)

Mr. Demming opened the case to the jury on behalf of the plaintiff.

PLAINTIFF'S EVIDENCE.

LIZZIE MINERVA TROXELL, having been duly sworn, was examined and testified as follows:

By MR. DEMMING:

Q. Where do you live?

A. My home is 362 Washington Street, Phillipsburg, New Jersey.

Q. How long have you lived there?

A. I went to Phillipsburg the last week in July, the July that my husband was killed, and I have been there ever since that time.

Q. That is, in July 1909?

A. Yes, sir.

Q. Was Joseph Daniel Troxell your husband?

A. Yes, sir.

Q. When were you married?

A. The twelfth day of August, 1905.

Q. Where?

A. At Nazareth, Pennsylvania.

Q. Have you your marriage certificate?

A. Yes, sir.

(Marriage certificate produced.)

(The marriage of Lizzie Minerva Troxell and Joseph Daniel Troxell is admitted by defendant's counsel.)

Q. When was your husband killed?

A. On the twenty-first day of July, 1909.

Q. What was he working at at that time?

A. He was a fireman on the D. L. & W. Railroad.

Q. Was he killed while he was attending to his duties?

A. Yes, sir.

Q. When did you last see him?

A. On the morning that he left the house, about six o'clock.

Q. About six o'clock in the morning?

A. Yes, sir.

Q. Have you taken out letters of administration on his estate?

A. Yes, sir.

Q. Is that a certificate of your letters of administration?

(Certificate shown witness.)

A. Yes, sir.

Mr. Demming offered in evidence certificate showing that on the twenty-seventh day of December, 1910, letters of administration were granted to Lizzie M. Troxell on the estate of Joseph Daniel Troxell, late of the Borough of Nazareth, the certificate being signed by Frank D. Zellers, Deputy Register of Northampton County, Commonwealth of Pennsylvania, and the certificate granted on the twenty-seventh day of December, 1910.

By MR. DEMMING:

Q. You are, therefore, the administratrix of the estate of Joseph Daniel Troxell, this dead man?

A. Yes, sir.

Q. Had you any children by Mr. Troxell?

A. Two.

Q. Give us their names.

A. Willard Troxell and Vera Troxell.

Q. One boy and one girl?

A. Yes, sir.

Q. How old are they at the present time?

A. The boy will be six years old in March—the seventeenth day of March of next year, and the little girl was three years old on the sixth day of this month.

Q. What sums of money—what earnings did your husband give you, by the week or by the month?

A. I have looked over my accounts and I find the average was about \$70 a month.

Q. He gave you about \$70 a month?

A. Yes, sir.

Q. How old was your husband at the time of his death?

A. He was almost twenty-three years old, all but a couple of weeks.

Q. What sort of a man was he as to size?

A. He was a pretty heavy man. The last he weighed I think he weighed 160 pounds.

Q. Was he fairly tall?

A. Yes, sir.

Q. And muscular?

A. Yes, sir.

Q. Was he a man who complained of illness at any time?

A. No, sir; he had never been sick from the time we were married.

Q. Had he ever stopped work that you know of on account of illness?

A. Only once that he had sprained his shoulder in his work.

Q. How long did he stop that time?

A. I think it was only three days that he was away from work.

Q. That was the only time you knew of that he had an illness?

A. Yes, sir; that is the only time I know of.

Q. You know nothing of the accident itself?

A. No, sir; nothing but what I have heard after he was killed.

Q. When did you see him first after the accident?

A. Not until five o'clock in the evening.

Q. He was brought home?

A. Yes, sir.

Q. He was dead at that time?

A. Yes, sir.

Q. Were you put to any expense on account of his death?

MR. CAMPBELL: I object to that. What is the offer to prove—funeral expenses, or something of that kind?

MR. DEMMING: Yes.

MR. CAMPBELL: I object to that.

By MR. DEMMING:

Q. Were you put to any funeral expenses?

MR. CAMPBELL: I object to that. Funeral expenses are not a proper item in this case.

THE COURT: What do you want to prove that for?

MR. DEMMING: She is the administratrix of the estate.

MR. CAMPBELL: This is not an action by the estate.

THE COURT: This is an action for damages to her by reason of his death.

MR. DEMMING: Yes, sir; and the expenses by reason of his death.

THE COURT: The expense of burying him?

MR. DEMMING: Yes; his funeral expenses.

THE COURT: You may proceed.

(Objection overruled.)

(Exception noted for defendant by direction of the court.)

By MR. DEMMING:

Q. Did you have any funeral expenses to pay?

A. Yes; they are still unpaid.

Q. How much were they?

A. \$196.50.

Q. At the former trial you gave the bill as \$198.28.

A. I had forgotten the bill and I couldn't rightly remember any more. I made a mistake the other time. It is \$196.50.

Q. Joseph Daniel Troxell was your only support, was he not?

A. Yes, sir.

Q. Of yourself and of your two children?

A. Yes, sir.

Q. Since his death how have you been able to live?

A. My mother has been keeping the little girl as good as she could, and I have the boy with me and I was working out with him.

Q. You were unable to keep the little girl yourself?

A. I was unable to keep her. I couldn't take the two with me.

Q. Have you been working?

A. Yes, sir.

Q. And earning as much money as you could?

A. Going out by the day.

Q. You had the little boy with you?

A. I had the little boy with me.

Cross-examination.

By MR. CAMPBELL:

Q. What else did your husband, Mr. Troxell, do besides acting as a fireman for the Lackawanna Railroad Company?

A. He had been a brakeman.

Q. Did he ever do anything else immediately around the time of his death than work as a fireman for the Lackawanna road? Was he doing anything else?

A. Not while he was fireman.

Q. Hadn't he been a fireman for nearly two years prior to his death?

A. Yes, sir.

Q. Don't you remember it was testified in the other trial that his average earnings were \$57 a month?

A. He always gave me \$70 a month.

Q. How did he give you the \$70? How was it—in currency or check, or how?

A. Sometimes he paid it in check, and sometimes he had it cashed.

Q. Whose check would it be?

A. The D. L. & W. Company.

Q. Nobody else?

A. No, sir.

Q. You say that you got as much as \$70 a month every month?

A. Not every month. That was when he had good work that he always brought that amount home. That is what he always used to average.

Q. That was when he was working full time?

A. Yes, sir.

Q. When he was not working full time what would you get?

A. I don't remember him ever giving me any less than \$60.

By THE COURT:

Q. You do not remember accurately? Are you just guessing at it, or have you any record of what he gave you?

A. No, sir; he always gave me that amount. When they had more work of course he always used to average \$70 a month.

By MR. CAMPBELL:

Q. Do you remember in detail any of these months? Suppose I should tell you that in January, 1908, the Lackawanna Railroad paid him \$61.95 for services that month, would you say that you received as much as \$70 a month from him that month.

MR. DEMMING: That is a year and a half before the accident.

MR. CAMPBELL: I will get up to the accident.

A. I could not remember that far back.

By MR. CAMPBELL:

Q. Suppose I told you that in February of 1908 the Lackawanna Railroad Company only paid him \$34.65 for services, would you still persist in saying that you received as much as \$70 that month? Do you still say you got in February, 1908, as much as \$70?

THE COURT: Answer the question.

A. I can't remember that far back.

By THE COURT:

Q. If he only got \$34 you could not have gotten \$70?

A. No. He could not give it to me then, but he had been brakeman before.

By MR. CAMPBELL:

Q. Take the month of March, 1908, when the company paid him \$58.80. Would you say you got \$70 that month?

By MR. DEMMING:

Q. Do you remember that far back?

A. I don't remember that far back.

By THE COURT:

Q. Do you remember at all how much you got? You remember, I suppose, that once in a while you got \$70 and sometimes \$60, but you usually got the

check that he got from the company? You never got more than the company gave him?

A. Sometimes he had the check cashed himself, and of course he paid some bills that he had to pay for himself. Then he would hand the other money over to me.

Q. Did he have any other income other than what he earned with this company?

A. No, sir.

Q. Then you never could get more than he got from the company, could you?

A. No, sir.

Q. And sometimes less?

A. Sometimes he had it cashed, and of course paid something before he ever reached home, and he would give me the remainder of it.

By MR. CAMPBELL:

Q. Take the month of April, 1908, when the company paid him \$72.87. Do you testify that you received as much as \$70 from him that month, leaving him with only \$2.87 to support himself?

A. He always gave me his money. Of course, if he needed something he got some of it.

Q. Then, you gave part of this money back to him, did you?

A. That is, if he needed it, yes, sir.

Q. About how much would you have left out of this \$70 a month for the support of yourself and children?

A. I always saw that my rent was paid and that we had enough to live on.

Q. How much did he require to support himself? It took something, didn't it?

A. He never required anything, but what he needed he just got things that he had to have. The rest he always turned over to the family's support.

Q. How much a month did it require for him to live, to buy his clothes and outside meals, and a glass of

beer, or anything else? How much a month did that average? When he gave you his full pay how much would he get back afterwards?

A. I don't know just exactly how much he used to use, but I remember I used to have all that I needed for myself and children.

Q. Would he take back as much as \$5.00 a week from you?

A. No, sir; he never took that much.

Q. Suppose he gave you his full salary check, do you mean to say you would not give him \$20 out of it in the course of a month?

A. Not unless he bought something extra, a suit of clothing or something of that kind, of course; but any other time he had doctor's bills or something like that, he took it.

Q. Didn't he belong to any lodges or organizations that required the payment of dues?

A. No, sir.

Q. Take the month of May, 1908, when the company paid him less than \$70—

MR. DEMMING: State the amount.

By MR. CAMPBELL:

Q. \$68.88. Do you still say that he paid you as much as \$70 that month?

(No answer.)

THE COURT: She says she got what he got.

By MR. CAMPBELL:

Q. Take the month of June, 1908, when the company paid him \$60.27. Do you still say that you received as much as \$70 that month?

A. I don't say I received the \$70 that month. Sometimes he used to take something out, and I didn't keep any account of it.

Q. Take the month of July, 1908, when the company paid him \$57.54. Did you get \$70 that month?

A. I can't remember that far back.

Q. Take the month of August, 1908, when the company paid him \$62.58. You do not say that you got \$70 that month?

A. I do not quite understand that.

Q. I will take the year of the accident. Of course, you can remember what it was immediately before or a few months before the accident. If I told you that the company paid him in January, 1909, the sum of \$48.09, would you still persist in your statement that you got at least \$70 that month?

A. No, sir.

Q. Take the month of February, 1909, when the company paid him \$51.45. Do you still say that you got \$70 that month?

A. No, sir.

Q. Take the month of March, 1909, when the company paid him \$73.08. Do you still say you got \$70 from him that month?

A. Yes, sir; I did.

Q. That is, you got \$70 and he took \$3.08 to support himself during that whole month?

A. Yes, sir; I always paid the things out.

Q. You bought things for him, did you?

A. I attended to that myself. What he wanted he would come to me and ask me for it.

Q. How much did you get that month?

A. I can't remember how much it was.

Q. His clothes cost something, didn't they? Didn't his meals cost something?

A. I had something with it.

Q. Didn't it cost something to board him? Take the month of April, when he received \$67.62. Do you still think you got \$70 that month?

(No answer.)

Q. Take the month of May, when he got \$59.64. You certainly did not get \$70 then?

A. No, sir.

Q. Take the month of June, when he only got \$60.27. You did not get \$70 then, did you?

THE COURT: She says that he had no other income, and she did not get any more than he earned at this time, and I do not think that we need go any further on that line.

By MR. CAMPBELL:

Q. Give us fairly what you think it cost him to live, because if you are entitled to anything you are only entitled to it after deducting what his expenses would be. What do you think it cost him to live? What is the cost of board and lodging and clothes and lodge dues, and the money that he would blow in on amusements and moving pictures, and anything of that kind? What do you think that would average a month?

THE COURT: Tell us, as near as you can, about what he spent for himself.

A. Do you mean just on himself?

By MR. CAMPBELL:

Q. Yes; what would you approximate his board and lodging at, and everything? You are the only one that can tell us this just at the present time. It is in your mind, if not in ours.

By THE COURT:

Q. About what did he spend for himself? What would he get back from you and spend for himself?

By MR. CAMPBELL:

Q. \$25 a month, do you think?

A. No, sir; I don't think it was that much.

Q. \$5.00 a week?

A. No, it was not \$5.00 a week that he ever spent.

Q. \$4.00 a week? Counting his clothes and counting his board and lodging, what they were worth. It would be fully \$5.00 a week, would it not?

A. He never needed any more, than I could think of, than \$8 or \$10 a month.

Q. What would his board be worth up in that neighborhood?

MR. DEMMING: They kept house.

MR. CAMPBELL: It must have cost something to board him.

By MR. CAMPBELL:

Q. You are familiar with boarding houses up around Nazareth and places of that kind, where you lived. What would it cost him to board and lodge?

A. I don't know anything about board up there. I couldn't tell you.

Q. Did you pay these funeral expenses?

A. No, sir; I couldn't.

Q. Don't you know that the undertakers sued the railroad company for them?

A. I know he stopped me and said something to me about it, yes, sir.

Re-direct-examination.

By MR. DEMMING:

Q. You know the railroad company defended and would not pay him?

A. Yes, sir.

Q. And threw the bill back on you?

A. Yes, sir.

Q. Mr. Troxell lived with you where you kept house together?

A. Yes, sir.

Q. Have you a picture of Mr. Troxell just before he was killed?

A. Yes, sir.

Q. Is that his picture?

(Picture shown witness.)

A. Yes, sir.

Mr. Demming offered in evidence picture of Mr. Troxell identified by the witness.

Q. Did you have a picture of the wreck taken?

A. Yes, sir.

WILLIAM HENSE, having been duly sworn, was examined and testified as follows:

By MR. DEMMING:

Q. Where do you live?

A. Bethlehem, Pennsylvania.

Q. What is the street number?

A. 127 Church Street.

Q. How long have you lived there?

A. I have lived there about four years.

Q. Are you the father of Mrs. Troxell?

A. I am her step-father, yes, sir.

Q. Did you know her husband, who was killed in this wreck, in his lifetime?

A. Yes, sir.

Q. Please tell the court and jury what sort of a man he was, as to his physical aspect.

A. He was a big strong man, stronger than I am; a healthy man, and he worked every day and never failed an hour. The engineer is right here in court, and he says he was the best fireman he ever had on the road, you couldn't play him out at all; he was a big strong man.

Q. Was he as tall a man as you are?

A. Yes, sir; he was taller than I am.

Q. How much did he weigh?

A. About 180 pounds.

Q. Did you ever know him to be sick?

A. No, he never was sick that I know of, only once he got his finger mashed on a car and he was laid up for a couple of days.

Q. Working on the railroad?

A. Yes, sir.

Cross-examination.

By MR. CAMPBELL:

Q. He did not work full time as a fireman, did he?

A. Yes, he did; he worked all the time when he had work.

Q. When he had work, but there were lots of times when there was no work?

A. Certainly, when they hadn't work he couldn't work. He worked every time they had it. Every month they worked overtime. He did lots of overtime.

Q. When there was a surplus of work?

A. Yes, sir; certainly.

HARRY BUSS, having been duly sworn, was examined and testified as follows:

By MR. DEMMING:

Q. Where do you live?

A. Nazareth, Pennsylvania.

Q. What is your business?

A. Engineer on the railroad.

Q. Which railroad?

A. The D. L. & W., Bangor and Portland division.

Q. That is the division on which this accident occurred?

A. Yes, sir.

Q. How long have you been an engineer on that road?

A. Since 1903.

Q. Did you know this dead man, Joseph Daniel Troxell?

A. I did.

Q. In what way did you come to know him?

A. He fired for me.

Q. He was your fireman?

A. Yes, sir.

Q. Just tell the court and jury what sort of a fireman he was.

A. A good fireman.

Q. You have had other firemen beside him?

A. Yes, sir.

Q. How did he compare—

MR. CAMPBELL: I object to this. What is the purpose of this? This is a case for compensation, purely. It does not make any difference whether he was a good or bad fireman.

By MR. DEMMING:

Q. You say he was a good, capable fireman?

A. Yes, sir; he was a good fireman.

Q. Do you know how much he made a day at the time he was killed?

A. I am not positive; either twenty-one or twenty-three cents an hour.

Q. How many hours?

A. Ten hours a day.

MR. CAMPBELL: I object to that, because it was testified a few minutes ago that the hours were fluctuating. He is trying to show by this witness, by hearsay, how many hours the man worked. The records show, and the time-slips are here, the check slips, and everything else to prove it. How is this man going to testify how much this man earned? I object to it.

THE COURT: I think that objection is well taken. There is no use guessing at this when we have it to a certainty.

MR. DEMMING: I am not asking him to guess at it.

THE COURT: He may have been working ten hours a day at twenty-one cents an hour, and he may not have been. You have the records here. The objection is sustained.

(Exception noted for plaintiff by direction of the court.)

By MR. DEMMING:

Q. When did the accident happen?

A. On the 21st of July, 1910.

Q. Your train was a freight train, was it?

A. Yes, sir.

Q. And it was known as what? Had it any special number or name?

A. No; extra freight train.

Q. It ran from where to where?

A. All over the division. We had no special place to go to.

Q. Where did you generally start in the morning? Where did you start that morning?

A. We were running between Nazareth and Portland. The starting point was Nazareth.

Q. That morning you started at Nazareth?

A. Yes, sir.

Q. And Troxell was with you as the fireman?

A. Yes, sir.

Q. Tell the court and jury all you know about the accident.

A. There ain't much to it. Only these runaway cars ran into us and turned the engine over, and he got under it.

Q. Where did that happen?

A. About a mile or a mile and a half east of Belfast Junction.

Q. That is, you were out past Belfast Junction?

A. Yes, sir.

Q. Were you on a straight track or a curve?

A. A curve.

Q. A sharp curve?

A. It was a pretty fair curve, yes.

Q. A curve to the left the way you were going?

A. Yes, sir.

Q. What was the first you knew about these cars?

A. When I first saw them.

Q. How far away were they when you saw them?

A. Three or four hundred feet.

Q. You say they were between three and four hundred feet away?

A. Yes, sir.

Q. How fast were they going?

A. That is hard to say. I should say between forty-five and fifty miles an hour.

Q. Directly toward you?

A. Yes, sir.

Q. That is a single track road, is it not?

A. Yes, sir.

Q. Were you looking out the window at the time?

A. I was looking out the front, yes, sir.

Q. Out the side of the cab?

A. That I don't remember.

Q. You were looking ahead any way?

A. Yes, sir.

Q. Where was Troxell?

A. At his place on the tank.

Q. Shoveling coal?

A. Yes.

Q. He couldn't see them, while you could?

A. No.

Q. What did you do?

A. I don't know whether I hallooed for him to get off or whether I didn't, but I made ready to get off, but I wasn't off yet I don't think. It was done so quick that there wasn't time enough to see what was going on.

Q. How fast were you going?

A. Probably seven or eight miles an hour.

Q. As soon as you saw these cars three or four hundred feet away you immediately began to get off?

A. Yes, sir.

Q. Were you off before the cars hit the engine; hit your train?

A. Was I off the engine?

Q. Yes.

A. Well, that I couldn't say.

Q. How did you get off?

A. On the right side.

Q. After the wreck which side had the engine fallen on?

A. On the left side.

Q. Troxell was under the engine?

A. Under the tank, yes.

Q. What time in the morning did this happen?

A. 7.40.

Q. What time had you left Nazareth?

A. 7 o'clock, I think; I am not positive.

Q. Did you help to get Troxell out?

A. Well, yes, as much as I could.

Q. How long was it before you got him out?

A. About three hours and a half or four hours.

Q. Were they working all that time to get him out?

A. Yes, sir.

Q. You and the other members of the crew?

A. Well, we got help before. It was so long we couldn't handle it.

Q. What was his condition when you got him out?

A. Well, he was dead.

Q. How many cars were there that ran into you, did you say?

A. Six.

Q. What kind of cars were they?

A. Coal cars.

Q. Gondola cars? What do you call gondola cars?

A. Gondolas.

Q. Was there any locomotive to the six cars?

A. No.

Q. They were running by themselves?

A. Running by themselves.

Q. Anybody on them?

A. No.

Q. How about the grade there? Was it down grade from Pen Argyl all the way to where the wreck occurred?

A. No.

Q. How far was it down grade?

A. Five miles, or a little over, down grade.

Q. That is, from Pen Argyl down to your train,

where your train was running, it was down grade for five miles or a little over?

A. Yes, sir.

Q. And then what?

A. A slight up grade to where it struck us, for about probably half a mile.

Q. These cars were running, then, on a slight up grade for about half a mile?

A. Yes, sir.

Q. And yet they were going forty-five or fifty miles an hour?

A. Yes, sir.

Q. Was Troxell an ambitious man?

MR. CAMPBELL: I object to that, for the simple reason that it is not relevant, and Mr. Demming knows it.

MR. DEMMING: I want to show as to the man's possible future earnings.

By MR. DEMMING:

Q. Was Troxell taking an examination for an engineer?

MR. CAMPBELL: I object to that.

THE COURT: Where do you get any support for that kind of evidence?

MR. DEMMING: I think it is a proper thing for the jury to take into consideration what this man's earnings would have been immediately in the future. It is true that he was only earning about twenty-three cents an hour. I think that is what Mr. Buss said. That is, at that time, but if, as a matter of fact, he would have been an engineer within a week or two I think that is so close to the accident that it is relevant.

THE COURT: That is too speculative. I do not think that is competent. The objection is sustained.

(Exception noted for plaintiff by direction of the court.)

By MR. DEMMING:

Q. Was Troxell an active man?

A. He was a good fireman.

Q. He tried to get in all the time he could? That is, right, is it not? He did not shirk or leave his work?

A. He was a good worker; a good fireman.

Q. Haven't you said that he was the best fireman you ever had?

MR. CAMPBELL: I object to that. You know very well we admit that he was a good fireman.

THE COURT: I think the question is what was his earning capacity at the time of his death, and what was his health. That is all there is to it.

Cross-examination.

By MR. CAMPBELL:

Q. You say this crew on this engine—you and Troxell—went all over this division. What division are you talking about?

A. The Bangor and Portland division.

Q. Where does that run?

A. To Portland; it goes up the main line to Portland.

Q. In what state?

A. Pennsylvania.

Q. All in Pennsylvania?

A. All in Pennsylvania.

Q. Your locomotive don't go out of Pennsylvania?

A. No, we run out of Pennsylvania over the Martin's Creek branch, but that don't belong to the D. L. & W.

By MR. DEMMING:

Q. That is in New Jersey?

A. Yes, sir.

By MR. CAMPBELL:

Q. When do you run out there?

A. Occasionally we go down there.

Q. When prior to the date of Mr. Troxell's death did you go down?

A. That I couldn't tell you.

Q. Were you down there the day of Mr. Troxell's death?

A. No.

Q. Were you going there?

A. We were going to Portland—on the way to Portland. Whether we would have gone to Portland I don't know. We were headed for Portland.

Q. You said you had not seen these cars before in your examination-in-chief. Didn't you see them a day or two before?

A. I saw them on the 19th.

Q. Two days before?

A. Yes, sir.

Q. Where did you see them then?

A. At Pen Argyl.

Q. Explain how you saw them there, and where, and under what circumstances.

A. They were placed in the "Y" track up there at Albion No. 2.

Q. By whom?

A. By our crew.

Q. Was Troxell there?

A. Yes.

Q. Did Troxell help then with these cars?

A. Troxell handled the engine at the time the cars were placed in there.

Q. What do you mean by handling the engine?

A. He was the engineer of it. I left him have charge of the engine.

Q. That is, taking your place, do you mean?

A. Yes, sir; in drilling our train I left him have the engine at the time the cars were placed in Albion No. 2.

Q. That is customary for the engineer to let the fireman do this drilling?

A. Yes, sir; to give them experience.

Re-direct-examination.

By MR. DEMMING:

Q. Where were you when these cars were put in there?

A. I don't know whether I was on the engine or whether I was not. I couldn't say to that positively.

Q. He was acting as engineer?

A. In drilling, and I took his place and left him have charge of it. It is impossible for me to say that.

Q. Had Trenzell gone with your engine at any time to Martin's Creek?

A. Yes, sir; when we went there he went along.

Q. And Martin's Creek is in New Jersey?

A. There is a Martin's Creek on one side of the river and Martin's Creek on the other side. There is Martin's Creek in Pennsylvania and Martin's Creek in Jersey. That is all the difference.

Q. You went to the Martin's Creek in New Jersey?

A. Yes, sir; we went over the Pennsylvania.

Q. And then came back to Pennsylvania?

A. Yes, sir.

Q. And Trenzell was along?

A. Yes, sir.

Q. And this was the locomotive you would use for that purpose?

A. Yes, sir.

Q. Would that happen often?

A. No, sir; only when the company thought it necessary for us to go over there, that is all.

Q. Whenever there was any freight to go there you would take it over to Martin's Creek, New Jersey, with this locomotive?

A. Yes, sir.

WILLIAM H. GRUPE, having been duly sworn, was examined and testified as follows:

By MR. DEMMING:

Q. Where do you live?

A. Flickswell, Pennsylvania.

Q. Is that near Pen Argyl?

A. About five miles.

Q. What is your business?

A. Trainman.

Q. In what capacity on a train?

A. Flagging, just now.

Q. It is brakeman, is it not?

A. Brakeman, yes, sir.

Q. How long have you been a brakeman?

A. I have been a brakeman about twelve years.

Q. Working on what road during that time?

A. On the Bangor and Portland.

Q. That is part of the Delaware, Lackawanna and Western?

A. Yes, sir.

Q. You are a member of Troxell's crew?

A. No, sir.

Q. What crew are you a member of?

A. Q. E. Ruch's crew.

Q. That is the name of your conductor?

A. Yes, sir.

Q. Where does that crew work?

A. It works between Bangor and Pen Argyl.

Q. Has it any name? Is it known as any special crew?

A. No, sir; not any more than extra; a drill engine.

Q. It is a drilling crew, is it not?

A. Yes, sir.

Q. You drill the cars? You shift and drill cars?

A. Yes, sir.

Q. About the yards at Pen Argyl?

A. Yes.

Q. And the yards at Bangor also?

A. Yes, sir.

Q. You do not have a regular train?

A. No regular train, no, sir.

Q. But you shift and drill cars?

A. Yes, sir.

Q. In these different yards?

A. Yes, sir.

Q. How long have you worked about the yards at Pen Argyl, from which these cars ran?

A. Going on four years.

Q. You are familiar with all the conditions around that yard, are you not?

A. Yes, sir.

Q. There is a branch line, is there not, that runs from the main line up to Pen Argyl?

A. Yes, sir.

MR. CAMPBELL: I object to that as leading and ask that the answer be stricken out.

By MR. DEMMING:

Q. Where does the Pen Argyl branch leave the main line—about where?

A. About Parson's Quarry.

Q. What kind of a quarry is that?

A. A slate quarry.

Q. Are there any other slate quarries about there?

A. Yes, sir.

Q. Just name them.

A. West Albion, to the right.

Q. To the right of the main line?

A. Yes, sir.

Q. That is just across the track from the Parson Quarry?

A. Yes, sir.

Q. What other quarry?

A. And one up there to the right, that is Albion Quarry.

Q. That is the old Albion Quarry?

A. The old Albion Quarry, yes, sir.

Q. That is just off the siding where these six cars were found, is it not?

A. Yes, sir.

Q. Are those quarries large quarries?

A. The one is, the old Albion.

Q. Have all those quarries got large piles, known as dumps, of slate?

A. Yes, sir.

Q. How high are those piles of slate?

A. Well, I couldn't tell that.

Q. Give us your best judgment. Higher than this room, do you think?

A. Oh, yes, higher than this room.

Q. Some of them very much higher?

A. I have no idea how high they are at all.

Q. Where they take the slate out of the ground are there large cavities, openings, in the ground?

A. Yes, sir.

Q. Are they blasting about those quarries or not?

MR. CAMPBELL: I object to that as leading.

(Objection sustained.)

Q. Tell us about the blasting, if there is or not blasting in connection with the quarries.

MR. CAMPBELL: That is objected to.

By THE COURT:

Q. Do you know anything about it?

A. About blasting?

Q. Yes.

A. No, sir; that is, I know they do blasting, but that is all.

By MR. DEMMING:

Q. We know you are not a blaster yourself. Do they or do they not do blasting?

A. Yes, sir; they do blasting.

Q. Continually?

A. Yes, sir.

Q. Every day?

A. Yes, sir.

Q. In these different quarries?

A. Yes, sir.

Q. How long is the Pen Argyl branch that runs from the main line up to Pen Argyl?

A. I don't know.

Q. Give us your judgment. About how far is it up there?

A. You mean from the main line up to the station?

Q. Yes.

A. I dare say a quarter of a mile.

Q. Do you think it is any further than that?

A. Well, that is my judgment; a quarter of a mile.

Q. Is or is not that a blind spur? The Pen Argyl branch runs no further than the Pen Argyl station?

A. No, sir.

Q. When a train runs up to Pen Argyl then it has to come back on that branch to the main line again?

A. Yes, sir.

Q. You know about these six cars that ran away. You had seen them before they ran away, had you?

A. Yes, sir.

Q. What kind of cars were they?

A. Coal cars.

Q. What form—what type?

A. Gondolas; wooden gondolas.

Q. About how long?

A. I didn't take that much notice what kind of a car they are.

Q. You are a railroad man. You know that.

A. Sixty thousand capacity car.

Q. Can't you tell us about how long they were, including the end sills?

A. I should judge a thirty-six-foot car.

Q. Does that include the end sills?

A. I don't know whether it does or not. It just

says thirty-six feet. I don't know whether it includes the end sills or not.

Q. Were they loaded?

A. Yes, sir.

Q. With what?

A. Ashes.

Q. You could see the ashes over the side?

A. Yes, sir.

Q. They were heaped up with ashes?

A. Yes, sir.

Q. Had they air brakes?

A. Yes, sir.

Q. There were air brakes on the cars?

A. Yes, sir; air brakes on the cars.

Q. Had they hand brakes also?

A. Yes, sir.

Q. Had your crew done anything to these cars?

A. We pulled the cars out and placed cars on the rear of the switch, and placed them back in the switch again.

Q. What day was that?

A. On the 20th of July.

Q. The day before they ran away?

A. Yes, sir.

Q. About what time in the day?

A. About eight o'clock.

Q. In the morning?

A. Yes, sir.

Q. Do you think it was before eight?

A. I could not tell you that. I didn't look what time it was when we did that.

Q. Had you touched these cars after that until the time they ran away?

A. No, sir.

Q. You took these cars out for the purpose, you say, of putting other cars back of them?

A. Yes, sir.

Q. What kind of cars did you put back of them?

A. Box cars.

Q. For what purpose?

A. For loading.

Q. For the use of the quarrymen?

A. Yes, sir.

Q. To load with slate?

A. Yes, sir.

Q. Then, what did you do with these six gondola cars?

A. Placed them back in the switch.

Q. When you placed them back in the switch how far from the switch did you place the nearest car?

A. I should judge about a hundred and seventy-five or eighty feet from the point of the switch in.

Q. About a hundred and seventy-five or eighty feet from the point of the switch to the nearest point of the nearest car?

A. Yes, sir.

Q. How far away from these six cars did you place the box cars that you placed in there for the quarry?

A. The box cars were back there a couple or two yards.

Q. From the other cars?

A. Yes, sir.

Q. They were in no way connected with these six cars?

A. No, sir.

Q. The box cars were placed in a convenient place for the use of the quarrymen?

A. Yes, sir.

Q. These six gondola cars, you say they were not placed there with reference to the quarrymen in any way whatsoever?

A. No, sir.

Q. Not to be used by the quarrymen?

A. No, sir.

Q. Merely for the use of the railroad?

A. Yes.

Q. That siding is known as Albion No. 2, you say?

A. Yes, sir.

Q. About how long is that siding?

A. I don't know how long that siding is. I have no knowledge.

Q. Several hundred feet, is it not?

A. Several hundred feet.

Q. From which side of the Pen Argyl branch, going up towards Pen Argyl, does this siding go off—the right or the left side?

A. The right side.

Q. At the time of the accident was or was not there any derailing switch on this siding?

A. No, sir.

Q. Is there now?

A. Yes, sir.

MR. CAMPBELL: I object to that and ask that that be stricken out. You have no right to ask such a question as that, and if you do it again I will ask that a juror be withdrawn. I ask your Honor to instruct him not to ask such questions any more.

MR. DEMMING: I do not propose to be called down in this manner by my friend. He has no right to do it. I have a right to ask the witness questions, and if my friend objects let him make his objections to your Honor.

MR. CAMPBELL: I move that that question and answer be stricken out.

THE COURT: The question and answer are stricken out.

(Exception noted for plaintiff by direction of the court.)

By MR. DEMMING:

Q. What sidings are near this siding?

A. West Albion.

Q. Any other siding?

A. Albion.

Q. Albion No. 1?

A. Albion No. 1.

By THE COURT:

Q. This siding in question was Albion No. 2?

A. Albion No. 2.

By MR. DEMMING:

Q. They are the nearest sidings to Albion No. 2?

Is that correct?

A. Yes, sir.

Q. How far is West Albion siding from Albion Siding No. 2?

A. About two or three hundred feet.

Q. How far away is Albion No. 1?

A. About the same distance.

Q. Are they on the main line or not?

A. Yes, sir.

Q. Is there or is there not a grade on Albion Siding No. 2, the siding from which these cars came?

A. Yes, sir; there is a grade.

Q. A grade running toward the main line?

A. Yes, sir.

Q. Is there or is there not a grade on West Albion siding?

A. Yes, sir.

Q. Is the grade on West Albion siding greater or less, or about the same, as the grade on Albion Siding No. 2?

A. How is that?

Q. You have said that there is a grade on Albion Siding No. 2, from which these cars came, and that there is also a grade on West Albion siding.

MR. CAMPBELL: I object to this.

MR. DEMMING: Wait until I finish my question.

MR. CAMPBELL: You are going to ask about other sidings.

MR. DEMMING: I have a right to finish my question.

MR. CAMPBELL: I object to this line of examination and I will ask the purpose of it, bringing in other sidings.

By MR. DEMMING:

Q. Is or is not the grade on West Albion siding, which you say is the nearest siding to Albion Siding No. 2, greater or less, or about the same as the grade on the Albion Siding No. 2?

MR. CAMPBELL: I object.

THE COURT: What is the purpose of that question?

MR. DEMMING: The purpose of that is this: I shall follow that up by showing that West Albion siding, the siding nearest to Albion Siding No. 2, from which these cars ran away, was equipped with derailing switches, while Albion Siding No. 2 had none.

MR. CAMPBELL: I still press my objection, as it has absolutely nothing at all to do with it.

MR. DEMMING: It was in the former case. My friend has changed his mind since then. He did not object the other time.

THE COURT: What did the Court of Appeals say about these derailing switches?

MR. DEMMING: They did not touch on it at all. Nothing was said about it.

MR. CAMPBELL: The Court of Appeals said that derailing devices were not in the case at all.

THE COURT: Do you propose to prove that at the time these cars ran away there was a derailing switch at the West Albion siding?

MR. DEMMING: Yes, sir.

THE COURT: The objection is overruled.

(Exception noted for defendant by direction of the court.)

(Question read.)

A. I think it is greater.

MR. CAMPBELL: If the court please, as a further objection to this gentleman testifying, he is not qualified as an engineer about grades. There is no evidence here as to what the West Albion siding was used for, the purpose, or anything else. I state that as a further reason for my objection, to go upon the record.

THE COURT: The objection is overruled.

(Exception noted for defendant by direction of the court.)

THE COURT: The witness can say what he knows about these sidings, and what they are used for, the different sidings.

By MR. DEMMING:

Q. Is not the grade on Albion Siding No. 2 about the same as on West Albion siding?

A. No, I think West Albion siding is heavier.

Q. West Albion siding you think has a heavier grade?

A. Yes, sir.

Q. And on both sidings, however, according to your experience there, you have to be very careful how the cars are placed?

A. Yes, sir.

Q. Or they will move themselves?

A. Yes, sir.

Q. Albion Siding No. 1, what is that used for?

A. Passing trains.

Q. The passage of trains?

A. Yes, sir.

Q. Explain what you mean by that.

A. Well, doubling from Edleman to Pen Argyl.

Q. Explain what you mean by that. We are not all railroad men. Do you mean by that that when two trains pass each other on the main line they use Albion Siding No. 1?

A. No, I don't mean that. I mean when they are doubling their train—fetching up half of their train—they go there and get the other part of it. That is what it is used for mostly.

Q. That is, when a through train is going through? Is that what you mean? When a train is going through on the main line they use Albion No. 1?

A. That is, for doubling, for half of the train.

Q. For passing each other?

A. Yes, sir.

Q. Is Albion No. 1 siding ever used for the storage of cars?

A. No, sir.

Q. What sidings there are used, or at the time of the accident were used, for the storage of cars, for cars to stand?

MR. CAMPBELL: I object to that, as it has nothing at all to do with this case. Please state the purpose of your offer.

MR. DEMMING: My offer is to show that both West Albion siding and Albion Siding No. 2 were used for the storage of cars, and but one of those sidings was equipped with derailing devices.

(Objection overruled.)

(Exception noted for defendant by direction of the court.)

(Question read to the witness.)

A. West Albion.

By MR. DEMMING:

Q. Any other siding?

A. Albion No. 2.

Q. The siding from which these cars came?

A. Yes, sir.

Q. At the time of the accident which of these two sidings were equipped with derailing devices?

A. West Albion.

Q. On which end?

A. Both ends.

Q. Was there any derailing device on Albion Siding No. 2?

A. No, sir.

Q. Do you remember testifying before in this case, or in a case based upon this same accident?

A. I remember testifying, yes, sir.

Q. Do you remember what you said in that former testimony about the grades of these two sidings—West Albion siding and Albion Siding No. 2?

MR. CAMPBELL: I object to my friend trying to contradict his own witness, and also to cross-examine him.

MR. DEMMING: I am not trying to contradict him. I am trying to refresh his memory. I have a perfect right to refresh his memory that way.

THE COURT: I will permit it in this case. I think there is a reason for it.

(Objection overruled.)

(Exception noted for defendant by direction of the court.)

By MR. DEMMING:

Q. Do you remember what you said before about the grades?

A. No, I don't remember that.

Q. Do you remember you said before that the grades on the two sidings were about the same?

MR. CAMPBELL: I object. He is trying to contradict his own witness.

(Objection overruled.)

(Exception noted for defendant by direction of the court.)

A. I don't remember that.

By MR. DEMMING:

Q. Your memory was fresher then than it is now?

A. Yes, sir; it is too long for me to remember that.

Q. Your memory was fresher then than it is now?

THE COURT: He says he does not remember.

By MR. DEMMING:

Q. Do you remember saying this: "Q. With reference to the grade: Is the grade on West Albion siding greater or less than the grade on Albion Siding No. 2, from which these cars came? A. That is more than I can tell you. Q. You would not like to say? A. I do not know anything about the grade part. I could not tell you that. Q. Based upon your experience in putting cars in on those sidings? A. We have got to put the brakes on good on both switches to hold them." That is true, is it not?

A. Yes, sir.

Q. Do you remember this: "Q. On both sidings. Then, you think the grade is about the same? A. About the same, as near as I can tell." That is true, is it not?

A. Well, I do not remember that.

Q. Isn't that true?

MR. CAMPBELL: If your Honor please, are you going to allow this former record to go in this way?

THE COURT: When you put a witness on the stand you have to take his testimony. You cannot put him on the stand and cross-examine him unless he shows distinctly a prejudice against you. I do not think this witness has.

MR. DEMMING: It is merely to refresh the

witness's memory, that is all. It is a year and a half ago.

THE COURT: You cannot do it that way. You cannot get in evidence from a former trial in that way.

(Objection sustained.)

(Exception noted for plaintiff by direction of the court.)

By MR. DEMMING:

Q. Is the water shed—you know what I mean by the term "water shed," don't you? Do you know what a water shed is? It is the top of the grade, in other words. Is the top of the grade or the water shed in that locality?

A. I don't understand what you mean by the top of the grade.

Q. That is, is the track or is it not down grade from Pen Argyl—down the Pen Argyl branch to the main line?

A. Yes.

Q. Is it down grade all the way from Pen Argyl down toward Nazareth for several miles?

A. Yes, sir.

Q. Then, take the other side. Is it down grade toward Bangor?

A. Yes, sir.

Q. Where does that grade change?

A. At Pen Argyl Junction.

Q. About at the place where the Pen Argyl branch leaves the main line?

A. No, not quite there; between the West Albion and the Albion switch.

Q. Between West Albion and Albion No. 1?

A. Yes, sir.

By THE COURT:

Q. That is the high point, is it?

A. That is the high point.

Q. That is, what you call high point and what Mr. Demming calls the water shed?

A. Yes, sir.

By MR. DEMMING:

Q. Just look at this map and tell us whether or not that map is correct.

MR. CAMPBELL: I object to that. You have not qualified him as an expert witness.

MR. DEMMING: I am not qualifying him as an expert. He is familiar with the conditions.

MR. CAMPBELL: If your Honor please, if you will look at the map you will see that there is no scale to it, or anything else.

THE COURT: You cannot refer to other conditions and ask him to testify to the accuracy of a map. You can produce the map and have it identified by somebody that knows something about it and who took the measurements.

MR. DEMMING: If your Honor pleases, this is a map that hardly can be dignified by calling it a map, but it is a sketch made under adverse circumstances, and if this witness can identify the locations as marked, and if they are marked on this sketch sufficiently well, I should think it would help to enlighten the jury, because these gentlemen have never seen this locality.

THE COURT: If it is objected to you cannot use it.

MR. CAMPBELL: I have got a map, and I will give it to you if you want it.

MR. DEMMING: Let us see your map. My map was made based upon the testimony of the other trial.

(Blue print produced by Mr. Campbell.)

THE COURT: Have you nobody who is familiar with the situation—the *locus in quo*?

MR. DEMMING: We have an engineer here who is familiar, but of course he is not a railroad man, and did not become acquainted by means of years of working around these places. That was the importance, I thought, of having these places identified by a man who was there continually. I only wanted to show by this sketch the proximity of the quarries to the tracks. They are not indicated on this map that Mr. Campbell produces at all. It does not show the two sidings, one equipped with derailing devices and the other one not, and how close they were together. That is indicated in my little sketch. Nothing is shown on here. They have not got the quarries on here. They have not got West Albion siding or Albion Siding No. 1.

MR. CAMPBELL: That has nothing to do with the case.

MR. DEMMING: It seems to me that if this witness can identify these things that it will be a help to us.

THE COURT: Did your engineer go up there and go over the ground?

MR. DEMMING: Yes, sir.

THE COURT: It may be that he could testify to that.

MR. DEMMING: He can identify all those things, in a general way.

THE COURT: Then you may put him on the stand and prove your map, and then I will let this witness testify to it.

MR. CAMPBELL: To save time and trouble I will agree that he may put this sketch in. It is a

sketch made by Mr. Demming, I suppose. I will withdraw the objection.

MR. DEMMING: It is only a sketch. Nobody claims it is drawn to a scale.

By MR. DEMMING:

Q. Will you look at this little sketch and see whether that in a general way correctly states the position of these different places, the quarries, the tracks, the Pen Argyl branch, and the sidings, and the water shed, or where the grade changes.

By MR. CAMPBELL:

Q. Is that intelligible to you? Can you understand, by looking at it, the relative position of the piles of slate and things?

By MR. DEMMING:

Q. That is correct, is it not?

MR. CAMPBELL: Don't state a conclusion.

A. As near as I can get at it, yes.

By MR. DEMMING:

Q. There is nothing on there that is wrong at all that you see, is there?

A. Nothing that I see, no.

By THE COURT:

Q. As far as you know?

A. As far as I know, yes.

MR. OLIVER: If your Honor please, we will admit that that in a general way correctly represents the situation.

MR. DEMMING: It is not drawn to scale. I concede that. It is merely to help us all out.

By MR. DEMMING:

Q. Outside of any derailing devices, because my friend objects to that, has there been any change on this siding since the accident up to the present time?

A. Not as I know of.

Q. You would know about it?

A. I do not get up in there very often.

Q. You were there for some time after the accident, were you not?

A. I get up there once in a while. It is not so very often. May be once a month we get up that way.

Q. There is no change that you know of.

A. Not as I know of.

Q. When was the derailing switch put in on West Albion siding?

A. That I don't know.

Q. About how long before the accident?

MR. CAMPBELL: I object to anything about the derailing device on West Albion siding.

THE COURT: That having been admitted before, the objection is overruled.

(Exception noted for defendant by direction of the Court.)

By MR. DEMMING:

Q. Do you know?

A. No, sir.

Q. Can you tell us about how long before the accident?

A. No, sir.

Q. Can't you give us some idea?

A. The derail was there before I went to work on it.

Q. How long was that before the accident that you went to work?

A. About five years.

Q. There never had been a derailing device on Albion siding No. 2 before the accident?

A. No, sir.

Q. Did or did not you railroad men consider Al-

bion siding No. 2 and West Albion siding both as dangerous sidings?

MR. CAMPBELL: I object to that as stating a conclusion, and as leading.

MR. DEMMING: I will change the question.

By MR. DEMMING:

Q. Did or did you not, all you railroad men, who worked around there, consider West Albion siding and Albion siding No. 2 both as sidings from which cars were likely to run away?

MR. CAMPBELL: I object to that as leading, and I object to it as stating a conclusion and as manifestly unfair.

(Objection sustained.)

(Exception noted for plaintiff by direction of the Court.)

By MR. DEMMING:

Q. You are acquainted with the various duties of trainmen, are you not?

A. Yes, sir.

Q. Has a fireman of a locomotive anything to do with regard to a switch? What are the fireman's duties?

A. The fireman's duties are supposed to fire and watch for signals, as required.

Q. The fireman's duty is on an engine?

A. Yes, sir.

Q. Who attends to the switches?

A. The brakemen, the trainmen.

Q. That is no part of the fireman's duty?

A. No, sir.

MR. DEMMING: Mr. Campbell, you may cross-examine.

MR. CAMPBELL: If the Court please, before I cross-examine I move to strike out all this witness

has said about derailing devices upon West Albion switch, or any other switches, for the reason that the Court of Appeals has already decided that the derailing device, as far as we have gone, is not a factor in this case.

MR. DEMMING: I object to that, for this reason, that I shall follow this testimony up, of course, with testimony showing that these devices are absolutely necessary under conditions such as existed here, that they are not new-fangled devices, but that they are old, customary and ordinary devices used on all railroads, and have been for many years back.

THE COURT: The motion is overruled, and an exception noted for defendant.

(Exception noted for defendant by direction of the Court.)

MR. DEMMING: I want to ask the witness one more question.

By MR. DEMMING:

Q. When did you say was the last time your crew handled these cars that ran away?

A. On the morning of the 20th.

Q. About 8 o'clock that morning.

A. Yes, sir.

Q. And you did not handle them from that time on?

A. No, sir.

Q. You had nothing to do with them?

A. No, sir.

Q. You are sure of that?

A. Yes, sir.

Q. Your crew is the only crew around there, is it not?

A. No. There are other crews there, but we were the one that did the work around the yard, to amount to anything.

Q. Would any other crew be required to handle those cars?

A. I don't know that, whether they would or not.

Q. You don't know?

A. No, sir.

Q. Did you see any other crew handling them?

A. No, sir.

Q. Were you in that vicinity all that time? From that time up until the time of the accident?

A. No, sir.

Cross-examination.

By MR. CAMPBELL:

Q. Did you ever hear of any other crew handling these cars after you had handled them on the 20th?

A. No, sir.

Q. Who else is employed in that yard crew?

A. The trainmen.

Q. What are their names?

A. At that time, do you mean?

Q. At that time, July 20th, 1909.

A. Alvin Ackerman, Q. E. Ruch, conductor; Palmer Morey, engineer, and William Van Gordon, fireman.

Q. You say this engine upon which you were employed was engaged in shifting and drilling cars in and around Pen Argyl and Bangor?

A. Yes, sir.

Q. And you were so engaged on the 20th of July?

A. Yes, sir.

Q. And on the 21st?

A. Yes, sir.

Q. Where is Bangor?

A. About seven miles east of Pen Argyl.

Q. In Pennsylvania?

A. Yes, sir.

Q. Where is Pen Argyl?

A. In Pennsylvania.

Q. You worked between those two places?

A. Yes, sir; between Pen Argyl and Bangor.

Q. You say on the 20th it was what time in the day that you moved these cars?

A. About eight o'clock.

Q. Eight o'clock in the morning?

A. Somewhere around there.

Q. You moved them out, as I understood your examination-in-chief, in order to place two box cars on the rear end of the siding to accommodate some slate quarry there? Is that correct?

A. Yes, sir.

Q. How did you find those cars at that time, when you first went there on the 20th?

A. I was not there when we first pulled them out. I was taking care of the rear end of the train.

Q. You came in afterwards?

A. Yes, sir.

Q. Did you help put the cars back?

A. Yes, sir.

Q. Do you remember anything about the brakes, the blocks?

A. Yes, sir.

Q. Describe in your own way—

MR. DEMMING: I object to this as not being proper cross-examination.

MR. CAMPBELL: I have not asked my question yet.

By MR. CAMPBELL:

Q. Describe in your own way how you put those cars back upon the siding and where you put them, as you have testified you did in chief.

MR. DEMMING: I object to that as not proper cross-examination. He was not asked as to how he put the cars back.

THE COURT: He was.

MR. DEMMING: He was asked as to the location of the cars, but not as to moving or anything of the sort.

MR. CAMPBELL: In putting them back, and also in putting cars on West Albion and on Albion No. 2, the witness said that he had to do it in a certain way, brake good.

MR. DEMMING: If that is their defence, they have a right to call this man in defence. It is not cross-examination of the examination-in-chief.

THE COURT: It does not appear yet that he is going into his defence. You asked him whether they moved these cars, and he said they moved them and put them back after they put other cars behind them. He has a right to cross-examine him as to that.

MR. DEMMING: He is asking about blocks.

THE COURT: No; he is not.

(Last question read.)

(Objection overruled.)

(Exception noted for plaintiff by direction of the Court.)

A. We picked up the cars and set them out on the Pen Argyl Branch, and placed two cars on the rear end of the switch and came out and picked up the six cars and took them in again, and I put on the four rear brakes.

MR. DEMMING: I object to that, the latter part of the answer, and ask that it be stricken out.

THE COURT: That will be stricken out.

MR. CAMPBELL: In the examination-in-chief, Mr. Demming brought out the fact that when he put these cars on the siding, West Albion and Albion No. 2, they had to break them strong, because

they would be apt to go out. Now I am cross-examining on that point.

THE COURT: If he did, you have a right to cross-examine him on that.

MR. DEMMING: That was in reference to these sidings. He can cross-examine him all he pleases with respect to the sidings and whether cars will stand on those sidings.

THE COURT: You asked him whether or not it was necessary to brake cars when they took them on those sidings.

MR. DEMMING: Yes, sir.

THE COURT: He has a right to cross-examine on that.

MR. DEMMING: But I asked him nothing with reference to these particular cars, how he braked them. This is not cross-examination.

THE COURT: It is legitimate cross-examination, that if it was necessary to brake cars when they put them on that siding. It is a legitimate question to ask on cross-examination, whether he braked these cars when he put them on this siding. What did you offer that evidence for? To show that it was dangerous to put cars on there without brakes?

MR. DEMMING: Exactly; and to show the similarity between the two sidings.

THE COURT: Now he has a right to find out whether he braked them. I did not know you had asked that question.

MR. DEMMING: That was only in reference to these two sidings, as to a comparison of the sidings, but that question was not asked with reference to these six cars.

THE COURT: This question is permissible. The objection is overruled.

(Exception noted for plaintiff by direction of the Court.)

By MR. CAMPBELL:

Q. Describe in your own way when you put these cars back what you did and your crew did in braking and blocking them, and why you had to do it, because you have testified in chief that it was necessary to do it.

A. As I stated before, we took them out on the Pen Argyl Branch, and took them back in, and I put on the four rear brakes, and the conductor and the head brakeman doubled on to another brake, and as I came walking up I saw the block under the head car on the right-hand side, on the engineer's side.

Q. How were the brakes—in good condition?

A. In working order; yes, sir.

Q. You put the brakes on the four rear cars?

A. Yes, sir.

Q. Did you put them on strongly or not?

A. As strong as I could pull on them with my hands.

Q. After applying the brakes on these four rear cars would it hold the cars from going out on the siding?

MR. DEMMING: That is objected to as leading.

(Objection overruled.)

(Exception noted for plaintiff by direction of the Court.)

A. Yes, sir.

Re-direct-examination.

By MR. DEMMING:

Q. You say you braked the four rear cars?

A. Yes, sir.

Q. What do you mean by that?

A. Putting the brakes on them.

Q. Are you speaking now of the morning of the 20th of July, about eight o'clock?

A. Yes, sir.

Q. You are the only man who had anything to do with the brakes on the four rear cars?

A. On the four rear cars; yes, sir.

Q. Who braked the two front cars?

A. I saw the conductor and the head brakeman brake one car.

Q. Which car was that?

A. The head car.

Q. You did not see them braking the other car?

A. No, sir.

Q. How did you know the cars were braked, the cars that you braked?

A. How did I know?

Q. Yes. How did you know it?

A. I could tell by braking them whether they are braked good or not.

Q. By braking them you can tell by turning the wheel?

A. Yes, sir; turning the wheel.

Q. And then when you went up to the front of the six cars you saw a block under the wheels, did you?

A. Yes, sir.

Q. Just one block?

A. One block. That is all I took notice of. That is all I noticed, one block.

Q. Was that the right wheel or the left wheel going down?

A. The right.

Q. Towards the Pen Argyl Junction?

A. Yes, sir.

Q. The right front wheel?

A. Yes, sir.

Q. You did not examine those brakes, to see whether or not they were in good condition, did you?

A. I did not examine them, no. I did not examine them that close, no.

Re-cross-examination.

By MR. CAMPBELL:

Q. You say you can tell very readily whether the brakes are in good condition when you put them on? Is that true?

A. Yes, sir.

Q. And these brakes were in good condition?

A. The brakes were all in working condition, all four of them.

Q. You say the brakes that you applied on those four rear cars would hold the whole six right in there, do you?

A. The four brakes would hold the whole six right in there, yes, sir.

By MR. DEMMING:

Q. All you know about whether they were in good condition or not is because you put the brakes on?

A. Well, yes. I could tell by feeling a brake whether it is in good condition or not.

Q. They seemed to feel pretty good, did they?

A. Yes, sir.

Q. And that is the reason you say they were in good condition?

A. Yes, sir.

By MR. CAMPBELL:

Q. Did you see the brake shoes against the wheels when you got down?

A. I didn't look at that. We never look to see whether the brake shoes are against the wheels or not.

GEORGE KERN, having been duly sworn, was examined and testified as follows:

By MR. DEMMING:

Q. Where do you live?

A. Nazareth, Pennsylvania.

Q. What is your business?

A. Railroading.

Q. What position have you on the railroad?

A. Conductor.

Q. Freight conductor.

A. Yes, sir.

Q. Were you Troxell's conductor?

A. Yes, sir.

Q. He was a member of your crew?

A. Yes, sir.

Q. The fireman?

A. Yes, sir.

Q. How long have you been employed on that road?

A. Twelve years.

Q. Just tell us in your own way what you know of the accident itself. When you left Nazareth, what time it happened, and all that. Just tell us your story, as briefly as possible.

A. These cars came on us beyond Belfast.

Q. What time did you leave Nazareth?

A. 7:15.

Q. In the morning?

A. Yes, sir.

Q. You were going towards Portland, were you?

A. Yes, sir. The cars came down and met us beyond Belfast and collided with the head-end.

Q. How far is Belfast or Belfast Junction from Nazareth?

A. Three miles.

Q. How far had you gotten beyond Belfast Junction before the collision?

A. About half a mile.

Q. How far is it from that point up to Pen Argyl or up to the siding where these cars came from, Albion No. 2?

A. Five and a half miles.

Q. What part of the train were you on when the collision happened?

A. The rear end.

Q. How many cars had you?

A. Fourteen.

Q. Have you got the train book with you?

A. Yes, sir.

Q. Will you just tell us where those cars were destined for, one after the other?

A. Do you want them read off?

Q. Yes.

A. One car was for Chicago, Illinois; one car was for Portland, Pennsylvania; one car was for Portland, Maine; one car was for Waterville, New York; two cars were for Newark, New Jersey, and one for Belfast, Pa.

Q. That you had taken out, hadn't you?

A. That was to go in that territory. And one for Martin's Creek, Pa.

Q. Pennsylvania or New Jersey?

A. Pennsylvania. One for Jivette, Ohio; one for Danville, Virginia; one for Allefondia, Virginia; one for Richmond, Virginia; one for Tyrone, Pennsylvania; and there was one slate that I haven't got the destination of. I had just picked that up.

Q. You picked that up at Belfast?

A. Yes, sir.

Q. You left one at Belfast and picked one up?

A. Yes, sir.

Q. Was that your regular locomotive?

A. Yes, sir.

Q. Did that locomotive and that train sometimes go to Martin's Creek, New Jersey?

A. Not at that time.

Q. It had before that time?

A. No. We had been running between East Bangor and Nazareth. Two round trips.

Q. But sometimes your duties called you down to Martin's Creek, New Jersey, did they not?

A. No. Not as I can remember.

Q. You don't remember that?

A. No, sir.

Q. Troxell was the regular fireman?

A. Yes, sir.

Q. How long had he been fireman? About how long?

A. About two years, I judge.

Q. Was he a capable fireman?

A. Yes, sir.

Q. Did you help to get him out of the wreck?

A. Yes, sir.

Q. How long did it take to get him out?

A. It was eleven o'clock when we got him out?

Q. And the wreck had happened at 7:30, didn't it?

A. 7:30 or 7:40. Somewhere along there.

Q. Did you see these cars before the collision? I mean at the time of the wreck?

A. At the time of the wreck?

Q. Yes.

A. Yes, sir. After the wreck I saw them.

Q. I mean before they collided with the locomotive. On the morning of the wreck did you see the cars before the collision occurred?

A. No, sir.

Q. All you knew was the sudden stopping of the train?

A. Yes, sir.

Q. Troxell was dead when you got him out of the wreck?

A. Yes, sir.

Q. How fast was your train going at the time of the collision, so far as you can judge?

A. About five miles an hour. It had just started right.

Q. Did you recognize these cars, these six cars that ran into your train? Did you recognize what cars they were?

A. Cinder cars.

Q. After the wreck did you identify the cars? Did you remember having seen them before?

A. Yes, sir.

Q. Just tell the Court and jury where you had seen them before and under what circumstances.

A. We had put them in Albion No. 2 the day before.

Q. You mean two days before?

A. Two days before, the 20th.

Q. The accident happened on the 21st of July, didn't it?

A. Yes, sir. We put them in on the 19th.

Q. That was two days before?

A. Two days before.

Q. The day of the accident was Wednesday, and you had put them in on Monday?

A. Yes, sir.

Q. Two days before?

A. Yes, sir.

Q. What time of the day had you put them in?

A. About 2:30 or 3 o'clock in the afternoon.

Q. On Monday afternoon?

A. Yes, sir.

Q. Just tell us why you had put those cars in there.

A. We had a derailment there, right at Pen Argyl Junction.

Q. Where had you a derailment?

A. At Pen Argyl Junction.

Q. Under what circumstances? What train were you running at that time?

A. With a work train, unloading ashes.

Q. Was Troxell with you at that time?

A. Yes, sir.

Q. On the engine?

A. Yes, sir.

Q. Where was the derailment? About where?

A. Right opposite West Albion switch.

Q. On the main line just opposite West Albion switch?

A. Yes, sir.

Q. About at the change in grade, do you mean?

A. Right at the West Albion switch, at the east end of it.

Q. That would be that end? (Indicating on map.)

A. Yes, sir.

Q. Toward Nazareth?

A. No. Toward Bangor.

Q. This end? (Indicating on map.)

A. Yes, sir.

Q. What was derailed?

A. A cinder car.

Q. Had you all cinder cars in your train?

A. Yes, sir.

Q. How many?

A. We had seven in all.

Q. Seven?

A. Yes, sir.

Q. And these six were part of the train?

A. Three of them.

Q. Three of these six?

A. Yes, sir.

Q. Where did you get the other three?

A. Out of the West Albion siding.

Q. They were standing on West Albion siding?

A. Yes, sir.

Q. Then you attached them to three out of your train, and put the six up on Albion No. 2?

A. Yes, sir.

Q. What caused the derailment?

MR. CAMPBELL: This is going way into remote facts, and taking up valuable time. This has nothing to do with this case. I object for the sake of saving time, and as irrelevant.

MR. DEMMING: Two days before the accident there was a derailment, this witness says, and on

account of this derailment he put these six cars on this siding. I want to find out about this derailment.

THE COURT: What has that to do with this?

MR. DEMMING: It may have something to do with this case. I want to find out what occurred, what made them have to do it.

THE COURT: What could it have to do with this case?

MR. DEMMING: It might have a whole lot to do with it.

MR. CAMPBELL: I object to it.

THE COURT: The objection is sustained.

MR. DEMMING: I have certainly a right to inquire whether any of these cars were affected by this derailment. If they were, they were defective cars. The train of which these three cars were a part was derailed.

MR. CAMPBELL: If that is the purpose of the offer, I withdraw the objection.

MR. DEMMING: This witness says that on the morning of the 19th of July there was a derailment.

THE COURT: A derailment of what—of the train?

MR. DEMMING: That is what I am trying to find out.

THE COURT: He may tell us what was derailed.

By MR. DEMMING:

Q. What was derailed?

THE COURT: Tell us what was derailed?

A. One of the cinder cars.

By MR. DEMMING:

Q. One of these six cars that were on this siding?

A. No, sir.

Q. What caused the derailment?

A. I don't know. I haven't found out.

By THE COURT:

Q. Where did the derailment take place?

A. At Pen Argyl Junction, at the crossing.

Q. Not at this Albion No. 2 switch?

A. No, sir.

THE COURT: I do not see what that has to do with it.

MR. CAMPBELL: I objected for the purpose of saving time. It is absolutely immaterial, and has nothing to do with the case.

By MR. DEMMING:

Q. Why were these cars put on this siding?

A. In order to get the first-class train around through that West Albion siding, around the car that was derailed.

Q. Was not Albion siding No. 1 used as a passing siding?

A. This derailment was beyond that.

Q. And you had to use West Albion siding to get cars around?

A. Get cars out. We use all those sidings there, which we do every day, or did at that time.

Q. Why did you place these cars on Albion siding No. 2?

A. So as to have them all together.

By THE COURT:

Q. Had they been on the West Albion siding?

A. Three of them.

Q. And you wanted to clear the West Albion siding for the purpose of letting trains go around this derailed car on the main track?

A. Yes, sir.

By MR. DEMMING:

Q. Then, you took three cars that you found standing on West Albion siding and hooked those up with three cars out of your train and put the whole six cars up on Albion siding No. 2?

A. Yes, sir.

Q. That was on the afternoon of Monday, July 19th?

A. Yes, sir.

Q. Why did you take three cars out of your train?

A. To go ahead of the derailed car, clear the branch to go around.

Q. When this derailment occurred your train was going at what speed?

A. About eight miles an hour.

Q. And it was stopped very quickly on account of the derailment, was it not?

A. Yes, sir.

Q. How much of your train had air brakes on?

A. All of them.

Q. All of the cars?

A. Yes, sir.

Q. When the derailment occurred, as you have described, were not some of these cars considerably shaken up?

A. No, sir.

Q. With your train going eight miles an hour and suddenly stopped?

A. No, sir.

Q. Was not the air very quickly put on?

A. The air was put on quickly, yes.

Q. And that would be considerable of a strain on all the cars in the train, would it not?

A. Oh, no.

Q. You don't think so?

A. No, sir.

Q. Your train was going eight miles an hour?

A. Yes, sir.

Q. Do you know anything about the condition of these three cars which you found standing on West Albion siding?

A. No, sir.

Q. You just found them there and put them up without knowing their condition on Albion No. 2?

A. Yes, sir.

Q. Did you examine these three cars that you found on West Albion siding and the three cars which you took out of your train and coupled them together to see if there was anything at all the matter with the brakes?

A. No more than try the brakes.

Q. By trying them, you mean simply turning the wheel?

A. Yes, sir.

Q. And you relied entirely on that, as a test?

A. Yes, sir.

Q. Was any one of these three cars that you took out of your train next to the car, the particular car, that was derailed, immediately next to the car that ran off the track?

A. The three cars were right ahead of the car that went off the track. Three of the cars were right ahead of the derailed car.

Q. They were immediately next to it, were they?

A. Yes, sir.

Q. Ahead of it?

A. Yes, sir.

Q. What did you do with the car that was derailed?

A. We left it there for the wreck train to pick up.

Q. Do you know when that picked up the car?

A. That same afternoon.

Q. Did it run entirely off the track, off the right-of-way?

A. No. Just derailed and turned the trucks. That is all.

Q. Was there a defect in the brakes that caused that derailment, so far as you know?

A. No, sir.

Q. You don't know?

A. No, sir.

MR. CAMPBELL: He said, no, sir.

MR. DEMMING: I am asking him whether he knows.

MR. CAMPBELL: And he said, no, sir; there was not. -

By MR. DEMMING:

Q. Do you mean you do not know, or whether it was no part of the brake?

A. No, sir, I said.

Q. You don't know?

A. No.

Q. When you put these six cars on Albion siding No. 2 on the afternoon on the 19th, how far back from the point of the switch did you put the first car?

A. From the point of the switch?

Q. Yes. Or take the frog. Either way you choose.

A. From the frog we had them back about fifteen or twenty feet. That is, for a clearance.

Q. Just sufficient to clear the Pen Argyl branch?

A. We had about fifteen or twenty feet clearance from the main line.

Q. Do you remember testifying before in this case, or a case based on this accident?

A. Yes, sir.

Q. At that time you testified the distance was ten feet, did you not?

(Objected to.)

(Objection sustained.)

(Exception noted for plaintiff by direction of the Court.)

Q. At all events, you think they were just sufficient to clear the Pen Argyl branch?

MR. CAMPBELL: I object to that, as he has not said so. He said fifteen or twenty feet clearance.

(Objection overruled.)

A. A good clearance. That is what I would judge, yes, sir.

By MR. DEMMING:

Q. What kind of cars were these six cars?

A. Coal cars.

Q. Gondola cars?

A. Yes, sir.

Q. How long were they, including their sills?

A. They run from thirty-four to thirty-six feet.

Q. Loaded?

A. Yes, sir.

Q. All of them?

A. Yes, sir.

Q. With what?

A. Cinders.

Q. Heaped up?

A. No, sir.

Q. Over the top, I mean, so you could see it over the top?

A. No, sir.

Q. How much loaded?

A. Well, loaded even full.

Q. Were any of these cars marked "Shop"?

(Objected to as leading.)

Q. Had any of these cars any marks on?

A. No, sir.

Q. Chalk marks?

A. No, sir.

Q. Were any of these cars marked in such a way as to designate they were to go to the shop?

A. No, sir.

Q. Do you know?

A. Well, I always examine these, you know.

Q. Were these cars the class of cars that were being worked toward the shop at Stroudsburg?

A. No, sir.

Q. Had they air brakes on?

A. Yes, sir.

Q. All fixed?

A. Yes, sir.

Q. And hand brakes as well?

A. Yes, sir.

Q. Why were these cars left there for two days?

MR. CAMPBELL: I object to that, as that has nothing at all to do with this case.

THE COURT: I do not think that has anything to do with it, why they were left. They were left there. Is the purpose to prove that they were left there because they could not be used, were out of order?

MR. DEMMING: Possibly. I do not know. I do not know what he is going to say about them.

THE COURT: I will let you ask him the question.

MR. CAMPBELL: It is irrelevant, if he does it for that purpose.

THE COURT: It is very evident that he does not know what these witnesses are going to testify to, but I will make no further comment than this, that I am going to let him ask these witnesses what he wants to know.

By MR. DEMMING:

Q. What were these cars left there for those two days for?

A. We put them there to get them out of the way, to clear those sidings?

Q. The siding was cleared shortly after the derailment?

A. Well, we didn't need to use them after that any more.

Q. That was the only purpose?

A. Yes, sir.

Q. Do you know when the derailing devices were put on West Albion siding, how long before the accident?

MR. CAMPBELL: I object to anything about derailing devices.

THE COURT: We have had that as much as it is necessary, I think, and it has been testified it has been there four or five years. There is nothing that I see that shows any relevancy it has to this case.

MR. DEMMING: It may have with regard to the doctrine of the assumption of risk. That was the only purpose of asking that.

THE COURT: I do not see it. The objection is sustained.

(Exception noted for plaintiff by direction of the Court.)

At 12:45 p. m. a recess was taken until 2 o'clock p. m.

2 p. m.

By MR. DEMMING:

Q. You said before recess that no inspection at all had been made of the braking apparatus on these six cars that you had put on that siding. This is correct, is it not?

A. That no test was made?

Q. No inspection was made of the brakes.

A. The more than the pulling out of the siding, the brakes was on, worked properly.

Q. No inspection of the brakes themselves was made, any more than putting the brakes on?

A. No, sir; no more than pulling out of the siding, the brakes worked all right.

Q. And the three cars that you took out of your train and put up on the siding with these three other cars that you found on West Albion siding, you made no inspection of the brakes on those cars after the derailment?

A. Not those three, no, sir, but the three we pulled out of the West Albion we did, you know. We held on to the three and got three out of the West Albion to clear the siding for the passenger train, and shoved them up in No. 2.

Q. You took the three out of the West Albion and connected them up with three out of your train and put them on Albion No. 2?

A. Yes.

Q. No inspection of the brakes was made, other than putting the brakes on?

A. The three of them pulling out the brakes worked all right, and we left the brakes on to pull out of the siding, on account of being down hill; but the three we held on to, we did not make any test of them, no more than by the air when they parted from the derailment.

Q. You made absolutely no test at all of those three?

A. Of those three.

Q. Did you report the wreck?

A. Yes, sir.

Q. You reported that these cars had better be inspected, by reason of being in a wreck?

A. There was no need of it.

Q. Were there automatic couplers on all those cars?

A. Yes, sir.

Q. Just so we can have a fair idea of this, we will say that this little model here of a switch represents the Pen Argyl branch, that straight track representing the branch and this curved track to the right representing Albion No. 2. It curved off to the right from the Pen Argyl branch, did it not?

A. Yes, sir. This here is the Pen Argyl branch, on this side. (Indicating on model.)

Q. This is the Pen Argyl branch, we will say, the straight part. The curved part is Albion No. 2, from which these cars came.

A. Yes, sir.

Q. That curves off in the right direction; that is correct?

A. Yes.

Q. Now when cars run away, how do they get over an ordinary switch, such as is shown in that model?

A. They run right through there. (Indicating.)

Q. There is no difficulty at all in them doing that?

A. No, sir; no more than bending the points.

Q. They bend this point, do they?

A. Yes, sir.

Q. Bend it over that way, so as to get on to this rail? (Indicating on model.)

A. Yes, sir.

Q. And in running away they do that on an ordinary switch?

A. Yes, sir.

Q. There is no derail shown there, because there is no derail on that siding.

MR. CAMPBELL: There is one shown on the model.

MR. DEMMING: That is not a derail; that is the ordinary point switch.

By MR. DEMMING:

Q. That is the ordinary point switch, is it not?

A. Yes, sir. That is a regular style, or a point switch.

Q. Not a derail switch?

A. No, sir.

Q. And when the cars run away they jump over this, do they not, and then they bend this point? (Indicating.)

A. Yes, sir.

Q. Is that a photograph showing that wreck?

MR. CAMPBELL: I object. Don't you think that is rather unfair, after your Honor has ruled this photograph is not in evidence?

THE COURT: Yes. (To Mr. Demming) You ought to prove those photographs in the proper way before you present them.

THE WITNESS: Yes, it shows the wreck.

MR. DEMMING: We do not know who took that. It was sent to us. We do not know who took it at all. If this witness can identify that as a picture of the wreck—

THE COURT: We will not go outside of the established rules.

MR. DEMMING: I have not offered it yet.

THE COURT: What is the use of asking the witness when you cannot offer the photograph?

MR. DEMMING: I wanted to make the offer afterwards.

By MR. DEMMING:

Q. You say it does show the wreck?

THE COURT: I sustain the objection, even to asking him, because you have not shown what the photograph is, or who made it, or anything about it.

(Exception noted for the plaintiff by direction of the Court.)

Q. Was your crew up there after Monday, after you had put those cars on that siding?

A. At Pen Argyl?

Q. Yes.

A. Went by there; yes, sir.

Q. I am asking whether you went up the Pen Argyl branch?

A. No, sir.

Q. After you put those cars there, you did not?

A. No, sir.

Q. Nor was Troxell up there after that?

A. No, sir.

cross-examination.

By MR. CAMPBELL:

Q. You say you tested the brakes of the three cars that you took off that siding, West Albion?

A. The West Albion, yes, sir.

Q. And you say you made no further test of the three cars which were in your original train, other than the test that the derailment made itself?

A. The air test, that is all.

Q. And the brakes were all right on that air test?

A. Yes, sir.

Q. Held the cars?

A. Yes, sir.

Q. As a matter of fact, the braking of a train like that, where it parts and the air closes on the brakes, is one of the best tests you have of their sufficiency, is it not?

A. Yes; they will go on at once.

Q. So, therefore, on the 19th there were tests made to your satisfaction that the brakes upon all these six cars were in good condition?

A. Yes, sir; it stopped the engine and the three cars on the parting.

Q. Were the brakes in good condition?

A. Yes, sir.

Q. Who put those cars on Albion siding No. 2?

A. I put them on.

Q. Was Troxell there?

A. Yes, sir.

Q. Troxell, one of the previous witnesses testified, acted as engineer at that time?

A. He was running the engine; yes, sir.

Q. Did you know whether there was a derail there on Albion No. 2?

A. No, sir.

Q. You knew there was none?

A. There was none there.

Q. Do you know whether or not Troxell knew there was none there?

MR. DEMMING: I object. How does this witness know whether Troxell knew? How can he say what a dead man knew?

MR. CAMPBELL: The dead man might have told him.

THE COURT: You may ask him whether Troxell ever told him.

By MR. CAMPBELL:

Q. Did Troxell ever, in his lifetime, tell you that he knew there was no derail upon Albion No. 2?

A. No, sir.

Q. Do you know how often Troxell went into Albion No. 2 while he was in your crew?

A. I could not say how often, but I know he was in there quite often when he was braking. He was braking before he went firing.

Q. Was the switch in the same condition at that time?

A. Yes, sir.

Q. Was it not perfectly apparent to you that, if cars got away from Albion No. 2, they would drift on to the main line and down there five or six miles?

A. No, sir.

Q. Why not?

A. I never seen it that way, because we tried to drop them out of there at times and could not.

Q. Did you ever try to drop six loaded ash cars out of there?

A. Never tried to drop six ash cars, but other cars we have had in there, slate cars.

By THE COURT:

Q. Did you know about the down grade from where the cars struck to where the collision took place?

A. Yes, sir.

By MR. CAMPBELL:

Q. If the cars got away from Albion No. 2 and there was a down grade from there, would they not naturally go pretty fast?

A. If they got out of the switch, they would.

Q. Then if they did get out of the switch, they would go down rapidly, and that you knew?

A. Yes, sir.

Q. How do you know these brakes were in good condition? Just describe in detail how you knew they were in good condition on these six cars.

A. The way I know, from the three of them that we held hold of when we parted, it stopped the engine and the three cars within two car lengths.

Q. That shows the brakes on the cars must have, been sufficient?

A. Yes, sir; on the three.

Q. What about the other three?

A. We held fast to the three from the car that was derailed and ran down and picked those up out of the West Albion and left the brakes on to them to pull out of the siding. The brakes was applied to the three cars pulling out of the siding; to pull out of the siding after we stopped to throw the switch back, we left the brakes on and shoved them back into No. 2.

Re-direct-examination.

By MR. DEMMING:

Q. Did you use the air to brake them when you put them on the siding?

A. No, sir.

Q. Did not use the air?

A. No, sir.

Q. You never knew of six loaded ash cars to be on the siding before, did you?

A. No, sir, but coal cars loaded with coal, but not loaded with ashes, though; coal cars loaded with coal.

Q. Six of them at a time?

A. Yes, more than that.

Q. But on this siding ordinarily were nothing but box cars to be loaded with slate?

A. To be loaded with slate, and trains doubling, they would put their cars in there.

Q. This was a siding put in for the purpose of reaching these slate quarries?

A. Yes.

Q. And that is what it was ordinarily used for, merely for their convenience, to put cars in to be loaded with slate?

A. And the train crews doubling the hill, off and on, to put their cars in there.

By MR. CAMPBELL:

Q. Cars loaded with coal are a great deal heavier than cars loaded with ashes, are they not,

A. Oh, yes.

By MR. DEMMING:

Q. And it is put in a more modern car?

A. Same cars that ashes are put in.

H. E. GRIFFITH, having been duly sworn, was examined as follows:

By MR. DEMMING:

Q. Where do you live?

A. Bangor, Pa.

Q. What is your business?

A. Railroad man.

Q. In what capacity?

A. Trainmaster.

Q. What road?

A. D. L. & W. Railroad.

Q. What division?

A. B. & P.

Q. Bangor and Portland?

A. Yes, sir.

Q. That is the division on which this accident occurred?

A. Yes, sir.

Q. Have you the time slips or any papers or memoranda at all showing the earnings of this man Troxell at the time of his death?

A. Yes, sir.

Q. Just tell us what those are. How much was he earning a day at the time he was killed?

A. \$2.30 for 10 hours.

Q. 23 cents an hour?

A. Yes, sir.

Q. Give us his earnings while he was a fireman.

A. By the month, do you want it?

Q. By the month, yes.

A. Or the total?

Q. The total of each month.

A. October, 1907, \$11.34.

Q. That is when he began?

A. That is part of the month.

Q. That is not a full month, is it? Give us the full months.

A. That is when he started to work.

Q. I know, but give us the full months. Begin at the first full month.

A. November, 1907, \$62.58; December, 1907, \$62.79; January, 1908, \$61.95; February, 1908, \$34.65; March, 1908, \$58.80; April, 1908, \$72.87; May, 1908, \$68.88; June, 1908, \$60.27; July, 1908, \$55.86; August, \$71.82; September, \$70.35; October, \$65.94; November, \$55.65; December, \$60.90; January, 1909, \$48.09; February, \$51.45; March, \$73.08; April, \$67.62; May, \$59.64; June, \$60.27; July, \$34.86.

Q. July is the month in which he was killed? He did not complete that month, of course.

A. He worked 21 days, I daresay. He did not work the entire month, no, sir.

Q. Leaving out the month in which he began to work and beginning with the first full month, November, 1907, and going up to the 1st of July, have you added those up and averaged them?

A. No, sir.

Q. I have it here, and I wish you would see if this is not correct. From November, 1907, the first full month he worked as fireman, until the 1st of July, 1909, the last full month he worked as fireman, is a total period of 20 months. Adding the whole sum up and dividing by 20 gives me an average of \$67.95.

A. It will take me a little time to figure it all out.

MR. DEMMING: Let him figure it out and I will call another witness.

HEBER PARSONS, having been duly sworn, was examined as follows:

By MR. DEMMING:

Q. Where do you live?

A. Pen Argyl.

Q. How long have you lived there?

A. 22 years.

Q. What is your business?

A. Slater; work in a slate quarry.

Q. Do you work at the Parsons quarry?

A. Yes, sir.

Q. Is that the quarry shown on this sketch as being right there at Pen Argyl Junction?

A. Yes, sir.

Q. How far from the track is your quarry? About how far?

A. That is just according to the work I was working to?

Q. Yes, where you were working.

A. Where I worked was about between 50 and 70 feet away from the track.

Q. What part of the track do you mean when you say that? The Pen Argyl branch or main line?

A. The branch going up the Pen Argyl.

Q. Is or is there not frequent blasting in all those quarries about there?

(Objected to.)

MR. CAMPBELL: What is the purpose of proving there were explosions in the quarries there?

MR. DEMMING: I want to prove that there is frequent blasting in these quarries and that this blasting causes vibration, necessarily.

MR. CAMPBELL: I object to that. He does not say anything about that in his statement of claim.

THE COURT: That does not make any difference. Objection overruled.

(Exception noted for defendant by direction of the Court.)

A. Yes, sir.

Q. What other quarries are there besides this in the immediate vicinity?

A. West Albion, Old Albion, that is about the nearest.

Q. They are near the track?

A. The West Albion might be—oh, I don't know.

Q. Give us your best judgment, that is all.

A. Oh, I would say about 300 feet away from the track.

Q. How far is Old Albion?

A. From the branch line it is quite a ways, but the switch where these cars ran out of, that switch runs right into the Albion dump.

Q. The Old Albion dump and quarry is directly alongside of this siding from which these cars ran away?

A. At the end of the siding.

Q. How high are these dumps? About how high?

A. The dump I worked on was about 25 feet.

Q. And from that up to what height do they run?

A. Oh, I do not know.

Q. As high as this building?

A. I could not say.

Q. Much higher than 25 feet, do they not?

A. Some of them do, yes.

Q. Are they large quarries?

A. Yes, they are pretty large quarries.

Q. Employing about how many men?

A. That I could not tell you.

Q. Could you tell us in a general way about how many men your quarry employed?

A. Maybe employed a hundred; I do not know.

Q. And the other quarries about the same number?

A. Some are larger than others, you know.

Q. Are there cement quarries near there too?

A. No, sir.

Q. They are down toward Nazareth?

A. Yes, sir.

Q. Can you hear the blasting from the cement quarries about where you are?

A. Yes, some days you can, just according to how the weather is.

Q. Do you remember the 21st day of July, 1909?

A. Yes, sir.

Q. The day of this accident?

A. Yes, sir.

Q. Where were you?

A. I was tending to my work, at Parsons Bros. quarry.

Q. Where was your work that day?

A. Parsons Bros. quarry.

Q. I mean what part of the quarry, on the dump?

A. On the dump.

Q. On the dump nearest what part of the track?

The Pen Argyl branch or main line?

A. Pen Argyl branch.

Q. Is that the dump you said awhile ago was about 60 or 75 feet from the track?

A. About 25 feet—what, the distance you mean? Yes, about that distance.

Q. And about 25 feet high?

A. Yes, sir.

Q. What time in the morning did you go to work that morning?

A. We start about 7 o'clock. I might have went to work about 20 minutes of seven, quarter of seven.

Q. Tell the Court and jury in your own way what you saw of these six cars that ran away.

A. All I saw, I was tending to my work and I saw the cars going down the Pen Argyl branch, as you call it.

Q. Pen Argyl?

A. Just after they came out of the switch, and of course I did not know it was a runaway. I was attending to my work then. I thought it was maybe the brakeman was hauling them back, or the engine was attached to them. I did not know whether they was running away or not, until one of the boys said, "Those cars is running away". Of course, then I came out of my door and I saw then that there was no one on them, and I knew they were running away.

Q. When you first saw the cars, how far from that switch, from the Pen Argyl switch, had they gotten? This is the Pen Argyl branch and this is the siding. (Indicating on model.) Had they gotten by that switch or not?

A. They had just come out of the switch. They was about—maybe they was about between 10 and 20 feet away from the switch when I saw them first.

Q. You think the first car had just got 10 or 20 feet out of the switch?

A. That is when I noticed the cars going past, yes.

Q. Then the back cars would still be on the siding at that time? The first car was about 10 or 20 feet past the switch, and that would leave the back cars still on that siding, Albion No. 2, would it not, when you first saw them?

A. Well, I don't know. One of the cars might have been in the switch yet, just coming out of the end of the switch, you know, at the end of the switch.

Q. How fast were they going?

A. Oh, they were going very slow then.

Q. Was there anybody on them or anybody near them?

A. I did not take particular notice until I knew they was running away, and then I saw there was no one on them.

Q. From the place where you were, 25 feet up on the dump, had you a good view down on the track?

A. Yes, sir.

Q. Could you see all around in that vicinity?

A. Yes, I could see around there pretty well.

Q. Did you see anybody at all near these cars or near the siding on which they had been left standing?

A. No, sir.

(No cross-examination.)

CHARLES ECKERT, having been duly sworn, was examined as follows:

By MR. DEMMING:

Q. Where do you live?

A. West Pen Argyl.

Q. What is your business?

A. Polishing slate and loading slate.

Q. How long have you worked there?

A. Very near two years.

Q. What quarry do you work in?

A. Parsons.

Q. Do you remember the 21st of July, 1909?

A. Yes.

Q. Tell the Court and jury what you saw that morning.

A. I saw the cars run down the track over the switch. That is all I saw of them.

Q. Was there anybody near the cars?

A. No.

Q. Was there anybody on the cars?

A. No, sir.

Q. Had you a good view from where you were?

A. Yes.

Q. How high up in the air were you?

A. I do not know. I was up maybe 50 or 60 feet.

Q. You were up on the dump of the Parsons quarry?

A. Yes. I seen the cars coming around the dump and over the switch, and down over the track.

Q. Did you see anybody at all near the cars?

A. No, sir, nobody.

Q. How fast were the cars going when you first saw them?

A. They were not going so very speedy until they got over the switch. Then they went fast.

Q. Did you see them before they got out of the switch?

A. Yes, I seen them coming around the dump.

Q. You saw them coming around the dump over at the other quarry?

A. Yes.

Q. When you first saw them, how far was the first car from the Pen Argyl switch, do you think? How far from the Pen Argyl switch was the first car when you first saw them?

A. I cannot tell you that.

MR. CAMPBELL: There are two switches. The Pen Argyl is away down at the main line, near the Parsons quarry.

MR. DEMMING: I mean the switch on the Pen Argyl branch.

By MR. DEMMING:

Q. You know these cars were standing on Albion siding No. 2?

A. Yes.

Q. Had you seen them there before they went away?

A. I saw them standing there before they went away.

Q. When did the railroad men put them there?

A. I cannot remember.

Q. Do you know there is a switch there from Albion siding No. 2 leading into the Pen Argyl branch? You can read, can you not?

A. Yes.

Q. I think we had better go by description. There is a switch at Pen Argyl branch where this siding Albion No. 2 turns off? You know that, do you not?

A. Yes.

Q. Had these cars gotten to that switch yet on the Pen Argyl branch when you first saw them coming out?

A. I did not see them come out of the first switch. I saw them go through the second one.

Q. How far is the second switch from the first switch?

A. I do not know; not so very far.

Q. How many feet do you think?

A. It ain't no very big distance.

Q. Did you see these cars at all before they got on the Pen Argyl branch, off of the siding, Albion No. 2?

A. Yes, I saw them standing on No. 2.

Q. I mean after they started to run away, did you see them before they got over the switch, over Albion siding No. 2?

A. Yes, in between the two I seen them going.

Q. Could you see, from your position up on the dump—you say you were 50 or 60 feet up in the air—could you see all around where these cars had stood?

A. Yes.

Q. On the siding?

A. I could not see down to Belfast, where the damage was done.

Q. Could you see all around the siding, Albion siding No. 2, where these cars had been standing? Could you see up there?

A. I could see up there, yes.

Q. Could you see it well up there? Could you see everything around up there?

A. No, not when they stood away back, I could not see it very good—bushes.

Q. Could you see well enough to say whether or not anybody had been on these cars and had run away?

(Objected to.)

THE COURT: I do not think that is proper. "Had been on the cars"; that is indefinite.

By MR. DEMMING:

Q. At the time these cars started was there anybody on them, or about them?

MR. CAMPBELL: He has testified already that he did not see them start.

THE COURT: I will sustain the objection on that ground.

(Exception noted for the plaintiff by direction of the Court.)

THE COURT: You may ask him at or about the time.

By MR. DEMMING:

Q. Did you see anybody on these cars, or about these cars, at or about the time they ran away?

A. No, sir, not at the time they ran away I did not see anybody.

THE COURT: Did he see anybody about there at the time he saw them going out the switch?

By MR. DEMMING:

Q. Did you see anybody on the cars, or about the cars, at the time you saw them going out through the second switch?

A. No.

Q. At that time, or just before that time, did you see anybody up around where those cars had been standing?

A. No, I did not.

Q. Was there anybody up there?

A. I do not know.

Q. You could see up there?

A. Yes, sir.

Q. Did you see anybody?

A. No, I did not see anybody.

Cross-examination.

By MR. OLIVER:

Q. At the time that you saw the cars, you were working, were you not?

A. Yes, sir.

Q. And you were paying attention to your work?

A. Yes.

Q. Up where those cars were standing, there were a lot of bushes, were there not? On the switch where the cars were standing, were there not a lot of trees and bushes?

A. Yes.

Q. And it was in July and the leaves were in full bloom? Were there not leaves on the trees?

A. I do not know what that means.

Q. Were there not leaves on the trees around there? Did not the trees have leaves on?

A. Yes, of course.

Q. And there were a lot of trees up on the side track where these cars had been standing?

A. Yes.

JOHN PARSONS, having been duly sworn, was examined as follows:

By MR. DEMMING:

Q. Where do you live?

A. Pen Argyl.

Q. How long have you lived there?

A. 30 years.

Q. What is your business?

A. Slater.

Q. Where do you work?

A. The Golden Rule, Parsons Bros.

Q. How long have you worked there?

A. About three years.

Q. Were you working there on July 21, 1909?

A. Yes, sir.

Q. What time of the morning did you go to work?

A. About quarter to seven.

Q. Is there frequent blasting around about there?

A. Oh, sometimes.

Q. Almost every day?

A. Not always; some days there is not any blasting.

Q. There are several quarries in that vicinity, are there?

A. Yes, sir.

Q. On the morning of this accident what part of the quarry were you in?

A. In the lower dump.

Q. By the lower dump, which dump do you mean with reference to the railroad track?

A. The next dump to the railroad.

Q. Do you mean the Pen Argyl branch?

A. Pen Argyl branch, yes, sir.

Q. That would be that dump there? (Indicating on map.)

A. Yes, sir.

Q. Which way were you looking that morning?

A. About northeast.

Q. Were you looking in the direction of the siding where these cars had been standing?

A. Yes.

Q. Just tell the Court and jury what you saw.

A. On that morning we had just finished carrying out. I went in the shanty and began to work splitting slate—that is my business—and I heard screeching, and I looked around like this and saw the cars moving.

Q. These six cars you saw moving?

A. Yes, sir. I did not pay any more attention. I had an idea the train was moving them out. So a minute or so afterwards, maybe, the slaters on the other bank right across from me, they hollered over and said, "The cars are running away," and then I ran over closer to the track and saw them go down.

Q. What kind of screeching was it you say you heard?

A. You have all heard cars striking a curve; something like that, screeching like that.

Q. Was it very loud?

A. Yes, pretty loud.

Q. How fast were the cars going when you first saw them?

A. Oh, they were just moving.

Q. Just moving? Do you mean very slowly?

A. Very slowly, yes, sir.

Q. Can you indicate with your hands? Just creeping along, or what?

A. Just going very slow, just moving and that was about all.

Q. As fast as a man could walk, or slower?

A. Not as fast as a man could walk.

Q. When you first saw them moving, where was the first car with reference to the switch from the Albion siding going on to the Pen Argyl branch?

A. I could not hardly tell that.

Q. Had it gotten to that first switch when you first—

A. Had not gotten to the switch yet.

Q. Had not gotten to the switch yet?

A. Not when I saw them.

Q. Do you mean by that that they had just started to move from their position?

A. Just started.

Q. Was there anybody near them?

A. I did not see anybody.

Q. Could you see from where you were?

A. Yes, sir.

Q. Was there anybody on them?

A. Not that I saw.

Q. Could you see?

A. Yes, sir.

Q. When did they start to move faster?

A. After they got down over the switches, they began to go faster.

Q. Which switches do you mean? On the main line?

A. I mean the lower switches on the main line, yes, sir.

Q. After they had passed the two switches?

A. Yes, sir.

Q. What was the last you saw of them?

A. I saw them strike the curve going to the Grand Central, what we call it; it is down maybe about three-quarters of a mile, we watched them.

Q. How fast were they going then?

A. I could not tell. It looked like they were going pretty good when they struck the curve. We could see them going around, could not tell how fast.

Q. And the thing that called your attention to them was this screeching?

A. The screeching noise. That is what drew my attention.

Cross-examination.

By MR. CAMPBELL:

Q. You have often heard screeching before, I suppose, when cars were moved in and out of that siding, had you not, on account of that curve?

A. Yes, sir.

Q. You were working that day?

A. Yes, sir.

Q. You were not paying any particular attention to what went on except your work, I suppose?

A. That is all.

Q. And this was, as you say, not an unusual thing for cars to go in and out of that siding?

A. No, sir.

Q. When was your attention particularly directed to the fact that the cars were running away? How far had they gone then?

A. When they hollered and said they were running away, they were going about, 150 or 200 feet, maybe. They had passed the first switch, they had got on the Pen Argyl branch line.

Q. The last car had gone on the Pen Argyl branch line?

A. Yes, sir.

Q. Then you heard somebody from another quarry yell the cars were getting away?

A. From our quarry.

Q. And you did not pay any particular attention to the cars before that?

A. No more than I saw them move, heard the screeching.

Q. Were there any trees or shrubs around this Albion No. 2 siding?

A. Oh, yes.

Q. This was summer time, in July, when the foliage was very thick?

A. Yes, sir.

Q. You could not see all around the cars, could you, on that account?

A. You looked down on them.

Q. But you could not see the other side of the cars?

A. Oh, could not see beyond the cars, surely not.

Re-direct-examination.

By MR. DEMMING:

Q. Did you see anybody run away, or anybody around there at all?

A. No, sir.

Q. When you first saw the cars moving, did you see anybody near them?

A. I did not see anybody.

By MR. CAMPBELL:

Q. Did you look particularly for people?

A. Why no, I was not thinking of them running away.

MARSENA PARSONS, having been duly sworn, was examined as follows:

By MR. DEMMING:

Q. Where do you live?

A. In Plainfield Township.

Q. What county?

A. Northampton, Pa.

Q. How long have you lived up there?

A. Three years.

Q. What is your business?

A. Slater.

Q. Where do you work?

A. Parsons Bros.

Q. At their quarry near Pen Argyl?

A. At their quarry near Pen Argyl; not at the time of the accident, though. I worked at the West Albion at that time.

Q. At the time of the accident you worked at the West Albion?

A. Yes, sir.

Q. Is that the quarry on the opposite side of the track from the Parsons quarry?

A. Yes, sir.

Q. How far from the track is that quarry?

A. Oh, about 300 feet.

By THE COURT:

Q. Which track?

A. From the main track.

By MR. DEMMING:

Q. About how far from the Pen Argyl switch, Pen Argyl junction?

A. The junction? That is what I have reference to; about 300 feet from the junction.

Q. You were just opposite where the junction breaks off from the main track?

A. Yes, sir.

Q. Do you remember the morning of July 21, 1909?

A. I do.

Q. Did you see those cars at all moving that morning?

A. No, sir.

Q. What was the first you knew about it, the accident?

A. I noticed the cars on the——

Q. I mean as to the running away. Did you find out without being told about it?

A. I did not know they had run away until about 9 o'clock. I was told then.

Q. Had you noticed those cars before they ran away?

A. I did.

Q. When?

A. About a quarter of seven I noticed the cars.

Q. What morning?

A. The morning of the 21st, of the accident.

Q. The morning they ran away?

A. The morning they ran away, and the evening before they ran away, I noticed them.

Q. Just tell the Court and jury what it was you noticed about a quarter of seven on the morning that they ran away.

A. I noticed that the stick that they had under the cars, to block the cars with, was almost cut in two. That is the only thing that I noticed.

Q. By the stick you mean the block?

A. The block, yes, sir.

Q. Where was this block?

A. Under the front wheel, on the right hand side.

Q. On the right hand side of the front car?

A. Of the front car.

Q. Was that the only block?

A. The only block that I saw—well, there was no other block on that side.

Q. You could see the other wheel on the front of that car?

A. Yes, sir.

Q. Was there any block there?

A. No, sir.

Q. How far through that block had the wheels cut?

A. I cannot be so positive, but I should judge about three-quarters of the way, perhaps more.

Q. At the time you passed?

A. Yes, sir.

Q. Did you make any mental note of the fact at that time?

A. I noticed it in particular. I did not say anything to anybody, but I noticed that block in particular.

Q. What did you think to yourself?

A. I thought that it—

(Objected to. Objection sustained.)

Q. Had you seen these cars before that, the afternoon before?

A. On the afternoon before, yes, sir.

Q. Had you noticed the position of the block then?

A. The impression in the block was not as deep as it was in the morning.

Q. Then you mean by that that the cars, the flanges of the wheel had cut much further through the block?

A. I do.

Q. From the previous afternoon up to that morning?

A. -I do.

Q. A half an hour or thereabouts after you saw that block cut that much through, those cars ran out?

A. I do not know how soon after they went out. I did not know about it until about nine o'clock.

Q. Did you take notice of the brake shoes at all, whether they were tight?

A. No, I did not.

Q. When you came by those cars, was there anybody near them or on them?

A. Just at that time the men were going to work. There may have been 25 or 30 passing just at that time; nobody on the cars.

Q. You do not mean on the track, in the path?

A. On the path, yes.

Q. But nobody on the cars?

A. Nobody on the cars.

Q. Or interfering with them or tampering with them in any way?

A. Not that I saw.

Cross-examination.

By MR. OLIVER:

Q. On the morning of the accident, what time was it that you came down?

A. About a quarter of seven, I think.

A. What time in the evening before had you gone by?

A. About a quarter of five.

Q. Will you kindly describe the block that you saw?

A. It was a block about—well, between two and four feet long—I won't be positive to the length—and about 3 by 6.

Q. Was it a square block?

A. 3 by 6—yes, square block.

Q. Had you ever seen it before?

A. Not that I know of.

Q. Was it there in the morning, that same morning?

A. The same morning, yes, sir.

Q. I do not mean the morning of the accident now, but the morning of the previous day.

A. No, I will not say anything about that. I am not positive about that. I did not notice it.

Q. You did, however, take particular notice that night and the next morning?

A. Yes, sir.

Q. What attracted your attention? Why did you make such a personal investigation of it?

A. I passed right close by it, within about 10 feet of it, and I noticed the block and that the wheel had cut into it, and the impression was just simply into my mind that the brakes was not on and that was put there to keep the cars there.

Q. Did you ever pass this siding when there were cars on here before.

A. I have, yes, lots of times.

Q. You know now—can you tell us whether or not you ever saw a block under any of the car wheels previous to this morning or evening?

A. I do not believe I ever noticed a block under a car on the siding before.

Q. This was the only time, then, that you ever took any particular notice of blocks under car wheels?

A. Yes, sir.

Q. At the time of this accident, you were working in West Albion quarry, were you?

A. In the hole, yes, sir.

Q. Under what derrick were you working?

A. 1 and 2.

Q. Was it 1 or 2? Which?

A. The two.

Q. Were you down in the hole that morning?

A. Yes, sir.

Q. Under both No. 1 and 2?

A. They took blocks from the two ropes. I might have been on the side or between the two ropes, working on the one piece.

Q. Which derrick did you go down by, No. 1 or No. 2?

A. No. 1.

Q. This block that you have spoken of, on what side of the train was it?

A. On the right hand side.

Q. In which direction were you looking when you say right hand side?

A. I was looking the same way the cars stood, south.

Q. The cars might have been standing either way. Which way were you looking, up toward the main track?

A. I was looking toward the main track.

Q. And this block was, so we will have no mistake, about four feet long and about 3 by 6?

A. Between 2 and 4 feet long; I will not be positive.

Q. Between 2 and 4 feet and about 3 by 6?

A. About 3 by 6, yes.

By MR. DEMMING:

Q. When you say 3 by 6, do you mean 3 inches by 6 inches?

A. 3 inches by 6 inches, yes.

By MR. OLIVER:

Q. When you noticed this block, you were walking in the direction towards West Albion quarry, were you?

A. Yes, sir.

Q. In other words, you were walking down toward the Pen Argyl branch and down towards the main track?

A. I was walking at the side of the Pen Argyl branch, towards the main track.

Q. You did not walk down along this siding? (Indicating.)

A. No, sir.

Q. So that the closest you came to this block was at the Pen Argyl branch; is that right?

A. Pen Argyl branch, yes, sir, about 15 feet from the block.

Q. You say, do you, that that block under the front wheel was about 15 feet from you, walking alongside the Pen Argyl branch? Is that what you say?

A. Between 10 and 15 feet, as near as I could say.

By MR. DEMMING:

Q. You are merely estimating that, of course.

A. Yes, that is an estimate; that is so.

By MR. OLIVER:

Q. So we will have no mistake, you are quite sure, are you, that those cars and this block were about 15 feet from the Pen Argyl branch?

A. Oh, it might vary a foot or two either way; between 10 and 15, yes.

Q. We will say it was not over 20, to be sure.

A. It was not over 20.

Q. Do you mean now 20 feet from the frog or 20 feet from the point of the switch?

A. I mean about 10 or 15 feet from where I stood on the Pen Argyl branch, to the side of the switch No. 2, I believe you call it; from the right hand rail of the switch No. 2 to the left hand rail of the Pen Argyl switch. That is what I mean.

Q. Do you understand this map? (Showing witness blue print.) This is the main line. Here is the Pen Argyl branch. Pen Argyl station is at that point. You indicate on this map which direction you were traveling.

A. I was traveling this way. (Indicating.) I was traveling down Pen Argyl switch towards the main track. The cars stood here, about 15 feet from where I was walking, to this here, is where the cars stood. I do not mean from the point of the switch nor the frog.

Q. So when you say left and right hand you mean as you approach in a southerly direction?

A. Yes, sir.

Re-direct-examination.

By MR. DEMMING:

Q. In order to get this clear, which side of the Pen Argyl branch track was this path you were walking on, the right side or left side walking down?

A. There was a path on both sides, and they used to walk in the middle, but I was walking on the left hand side, or walking on the side towards the switch.

Q. From the position that you saw the block and the car on the previous afternoon and the position you saw the block and the car on the morning of the accident, did or did you not conclude that that car had moved a little?

MR. CAMPBELL: I object to that as stating a conclusion and as not being re-examination.

MR. DEMMING: I will restate it.

Q. From the position that you saw the block and the car on the previous afternoon and the position you saw the block and the car on the morning of the accident, did or did you not conclude anything with reference to a possible movement of that car in the meanwhile?

(Objected to. Objection sustained.)

THE COURT: He has said he saw those cars and where he saw them he was walking down along the left hand rail of the track and he was 15 feet from the right hand rail of the siding No. 2 where the stick was, from 10 to 15 feet. I will allow you to ask him whether that was the distance, or whether the cars had moved during the night to his knowledge.

By MR. DEMMING:

Q. You have said you saw these cars and the block under the front car the previous afternoon and you saw them again the morning of the accident, about quarter of seven?

A. Yes, sir.

Q. Had or had not these cars moved any in that time, according to your judgment?

A. I believe that I said that the impression in the stick seemed to be deeper. That was my impression, but the movement of the cars was not noticeable. I could not say that the cars had moved. The impression in the stick seemed to be deeper.

Re-cross-examination.

By MR. CAMPBELL:

Q. And you judged this 15 feet away through these bushes?

A. There was no bushes between myself and the car.

Q. You judged it over a distance of 15 feet?

A. Yes, sir.

Q. How long a time did it take you to examine this block when you first went there the evening before?

A. It was just simply a glance as I passed it.

Q. What was it the next time?

A. The same thing, just a glance.

By MR. DEMMING:

Q. But you are satisfied as to that impression?

A. Yes, sir, I am satisfied.

Q. You are satisfied that that block was merely cut through that morning?

A. Yes, sir.

MR. CAMPBELL: I object, because he never said that. "Nearly cut through," he said. I ask that be stricken out as not proper re-examination.

THE COURT: What did he say before? Strike it out and go back and find out what he said.

By MR. DEMMING:

Q. What was it you said?

A. I said it looked as though the stick was cut about three-quarters of the way through.

HEBER PARSONS, recalled.

By MR. DEMMING:

Q. Was there a man sent by you people to telephone down the line to the company that the cars were running away?

A. After we knew the cars was running away, Thomas Main, who worked there, he went over to the office—

MR. CAMPBELL: I object to what Thomas Main did.

By MR. DEMMING:

Q. You did all you could to notify the company of the fact?

A. He 'phoned down to Belfast station. Whether he got Belfast station or not, I do not know.

ALFRED WEEKS, having been duly sworn, was examined as follows:

By MR. DEMMING:

Q. Where do you live?

A. Philadelphia.

Q. What is your business?

A. Civil engineer.

Q. You are a graduate of what institution?

A. University of Pennsylvania.

Q. What year?

A. 1887.

Q. Just give us briefly your experience as a civil engineer.

A. I was employed on the Reading Railway in the Maintenance of Way Department; on the B. & O. on construction; on the Pennsylvania Railroad on construction; the Norfolk & Western on construction and maintenance; on the Wilkes-Barre and Eastern on construction. That covers a period of about 13 years. Since that time I have been practicing as consulting engineer and have been in charge of various pieces of interurban electric railway work and such classes.

Q. Do you consider yourself fully competent to testify as to the proper construction and running of a railroad in 1909?

(Objected to as too general.)

Q. From an engineering standpoint.

(Objection withdrawn.)

A. As regards construction and maintenance; operation hardly coming in under the engineering department.

Q. Have you had experience with mountain roads?

A. In construction, yes.

Q. And maintenance of way?

A. Yes.

Q. Have you examined the locality of this railroad where this accident occurred and from which these cars started or ran away?

A. Yes, I visited Albion No. 2 siding and went over the line from that point down to the neighborhood of Belfast Junction.

Q. Did you see the remains of the wreck there at that time?

A. At that time I saw the remains of burnt freight cars.

Q. What distance did you find that, from Albion siding No. 2, from which these cars came, down to the point where there were indications of a wreck?

A. As nearly as I could estimate in walking over it, it was somewhere in the neighborhood of six miles.

Q. What did you find as to the grade of that railroad from Albion siding No. 2, from which these cars came, down to the point of the wreck?

A. It was practically a descending grade the whole way. There were slight inequalities and may possibly have been a short ascending grade, but the general tendency was all a descending grade.

Q. Did you make a survey, or partial survey, of Albion siding No. 2 to ascertain the grade?

A. Yes.

Q. Have you that there?

A. I have the blue print of the map which I made.

Q. That is the siding from which these cars started?

A. The siding and the profile showing the grade.

Q. Just tell the Court and jury what you found there with reference to the grade on that siding.

A. On the siding, starting from the frog, the track was practically level for the first 100 feet.

Q. You mean the frog on the Pen Argyl branch?

A. The frog at the junction of Albion No. 2 siding and Pen Argyl branch.

Q. Level for how far?

A. For about 100 feet. From that for the next 500 feet the grade was ascending on an average of 1 per cent.

Q. By one per cent. grade what do you mean?

A. I mean one that rises a foot in a hundred feet, in horizontal difference.

Q. After the first 100 feet, which you say is practically level, is or is there not a very slight grade for the next 50 feet?

A. The grade is less the next 50 feet, going up about twenty-five one hundredths for the first 50 feet.

Q. Where does the steep part of the grade, the 1 per cent., begin?

A. The 1 per cent. begins about 200 feet from the frog.

Q. On the Pen Argyl branch?

A. On the Albion No. 2 siding.

Q. If six loaded ash cars, such as have been described here—you have heard the testimony this morning?

A. Yes.

Q. Had been placed on that siding, Albion siding No. 2, as Conductor Kern described, just sufficient to clear the Pen Argyl branch, would or would not those cars be likely to run away?

MR. CAMPBELL: I object. The question does not put in the rest of the qualifications, about being braked and blocked and things of that kind.

By MR. DEMMING:

Q. Leaving aside the question of brakes and blocks as Conductor Kern described, he put the cars just clear of the Pen Argyl branch. Now with reference to the level part and the grade part of that siding, would the cars so placed be likely to run away?

(Objected to. Objection sustained and exception noted for plaintiff by direction of the Court.)

Q. With the cars placed, six loaded ash cars, such as have been described here, 175 to 180 feet from the frog, or point of the switch on this siding, would they be likely to run away?

(Objected to. Objection sustained.)

Q. With the cars placed 175 feet to 180 feet—

THE COURT: Where is there any evidence of that kind?

MR. DEMMING: The yard crew has testified that that is where they placed those cars.

THE COURT: Testified as to what?

MR. DEMMING: That they placed those cars so that the first car was 175 to 180 feet beyond the point of the switch.

THE COURT: My recollection is that all the testimony is that the first car was from 10 to 15 feet away from the switch.

MR. DEMMING: That is where Troxell's crew placed them. Then the yard crew took them out and replaced them. If your Honor recalls, after putting box cars back of them for the use of the quarry, they then replaced these cars and they placed them about 175 to 180 feet beyond the point of the switch.

THE COURT: Who testified to that?

MR. DEMMING: Mr. Grupe, a member of the yard crew. That is in the testimony. Of course, I know it is a fair argument to the jury, but I do not want to omit offering to put in any evidence I should put in. Your Honor sees that puts all these cars on the steep grade, whereas, if they were just clear of the Pen Argyl branch, at least three cars are on the level part.

THE COURT: Have we the evidence of the grade of the switch all the way from the Pen Argyl branch back to the end?

MR. DEMMING: We have in evidence from this witness that the first part of the track is level.

MR. CAMPBELL: Practically level.

By THE COURT:

Q. What is it?

A. Level.

By MR. DEMMING:

Q. And for the next 50 feet a very slight grade?

A. A half of one per cent.

MR. DEMMING: And then after the 150-foot point begins the steep part of the siding, namely the 1 per cent. grade, a one foot rise in a hundred.

By THE COURT:

Q. All the way back to the end?

A. All the way back for 600 feet back of the frog.

By MR. DEMMING:

Q. Could cars run away from a level siding?

A. No.

Q. That is aside from wind blowing or other outside causes?

A. Yes, of course.

Q. I mean merely the cause of gravitation. Could cars run away from a one-half of one per cent. grade?

(Objected to.)

THE COURT: They did not run from that. They ran away from a one per cent. grade.

(Objection sustained.)

By MR. DEMMING:

Q. When you examined this siding was or was there not a derailing device there?

A. There was not.

Q. Is or is this not a siding such as would be described as a siding approaching the main line on a down grade?

A. Yes.

Q. Is or is it not proper practice to have a siding approaching the main line on a down grade without a derailing device?

MR. CAMPBELL: I object. The witness is not competent to testify under these facts. That is a

question the Supreme Court of the United States has held, in the Tully case, is a question for the management, and so has the Supreme Court of Pennsylvania. I object to the form of the question and also that it is irrelevant and also that this gentleman is not qualified to say what this company shall put on Albion No. 2, and in the next place, that the derailing device is not a factor in this case at all.

(Objection sustained and exception noted for the plaintiff by direction of the Court.)

By MR. DEMMING:

Q. How long have derailing devices been in use?

A. I can only speak from my own knowledge of those. I had charge of the installation—

By MR. CAMPBELL:

Q. Answer the question. How long have they been in use? Ever since railroads were in existence, I suppose?

A. I cannot answer beyond my own knowledge.

Q. Say when you first heard of them.

A. That is what I am going to do. I have had personal knowledge and experience of them since 1890.

By MR. DEMMING:

Q. How are they used and where?

MR. CAMPBELL: I object to this. It is already ruled that the derailment switch is not a factor here, and now we are going into what they are used for in Mr. Weeks' experience on other railroads. That is not relevant.

MR. DEMMING: I will make the following offer of proof:

Counsel for plaintiff offers to prove by this witness, and by the following witness, also a very capable and experienced engineer, that derailing devices, or derailing switches, as they are called,

are not new-fangled, extraordinary or very late inventions, but have been in use by all properly equipped railroads for from 15 to 20 years back, and that the customary and ordinary practice at the time that this accident happened, on all railroads, was to have so equipped with a derailing device, or a derailing switch, every siding approaching the main line, or leading to the main line, on a down grade. In addition to the above, plaintiff's counsel also, while conceding that there is no Federal statute at the present time touching upon or calling on railroads to install derailing devices, wishes by this offer to prove, notwithstanding this, that the absence of such a derailing device and the failure to use such a derailing device, under circumstances such as appear in this case, on a siding leading on a down grade to the main line, is ordinary negligence and that the defendant railroad company, failing to have had such a device installed on this siding, although it had other sidings of practically the same nature and practically the same grade in the immediate vicinity equipped with these derailing devices at the time of the accident, was guilty of ordinary negligence.

MR. CAMPBELL: I object on the ground that the offer is too large in its scope; second, the question of the derailing device has been passed upon by the Court of Appeals in this Circuit, holding that the derailing device under such circumstances is not necessary, and thirdly, it leaves out the question of alternate devices taking the place of derailing devices.

MR. DEMMING: Counsel for plaintiff, in reply to the objection of counsel for defendant, offers to show that there was not in the engineering practice, on railroads at the time of this accident, any alternative device to a derailing switch, but that

it is the only device known to the engineering practice that will prevent such an accident as here occurred.

(Objected to.)

THE COURT: The decision in the Court of Appeals was that the mere absence of a derailing switch furnished no evidence of negligence; but this was put upon the principle, enunciated by Justice Lamar in the Washington Railroad case, 153 U. S. 554, invoking the rule that a railroad company is not bound to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of the employees, nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. In other words, the Court put it upon the ground that the want of a derailing switch was no evidence of negligence, because the Railroad Company is not required to use absolutely safe machinery; and now the plaintiff offers to show that this is a device that does not come within the application of the rule, that this is an ordinary device, used by all railroads everywhere where there is a similar situation of grade, and that, being the ordinary appliance, the failure to use it here is negligence.

MR. CAMPBELL: Before your ruling, your Honor, that is not the exact question. Any engineer or any practical man will say that, if you furnish something to take the place of a derailing device, that is just as good, that is sufficient. Now, as I said when I argued the motion for a new trial in the other case here, suppose we had built a stone wall in front of those cars: the mere absence

of the derailing device beyond that would not make a particle of difference, and so the Court of Appeals said here. The testimony in this case so far is uncontradicted that those cars could not have been moved away, by his own witness, and why? Because they were braked and blocked in there. If they could not possibly have moved away, what on earth is the use of a derailing device?

THE COURT: I will not make any comment on that just now, as to the uncontradicted evidence. What I was about to say was that I would permit the plaintiff to prove that derailing devices are not an extraordinary device, but one, as he says he can prove, of the ordinary appliances for the general safety of employees, and that it comes within the rule that it is required to make railroading reasonably safe and stable.

MR. CAMPBELL: If he can prove that; but, even if there was a statute providing for a safety device on all railroads, it would not make any difference in this case.

THE COURT: The decision is that the railroad company is required to use the ordinary, reasonable devices known to railroading, but it is not required to discover new ones and to guarantee absolute safety by its devices. But it is required to use the ordinary devices which will make railroading reasonably safe, and he offers to prove that he can bring this device within that class of devices. If plaintiff's counsel can do that, I will let him do it, and I do not think it is at all in conflict with the decision of the Court of Appeals. The objection is overruled and the plaintiff will be permitted to offer evidence in accordance with that ruling.

(Exception noted for defendant by direction of the Court.)

By MR. DEMMING:

Q. For how long have derailing devices been used?

A. I answered that, to my certain knowledge, they had been in use for 20 years, since 1890 or 1891.

Q. Under what conditions are they used?

A. They are used to protect the main track from the accidental entry of cars upon it.

Q. From cars running away upon the main track; is that what you mean?

A. Yes.

Q. Upon what class of sidings or tracks are derailing devices used?

A. The practice is to use them on sidings which have a descending gradient toward the track, and they are frequently used to protect grade crossings of two different lines.

By THE COURT:

Q. Do all railroads use them?

A. Practically all the railroads that I am acquainted with use them.

Q. What railroads are you acquainted with?

A. Philadelphia & Reading, Pennsylvania Railroad, the Baltimore & Ohio; although my experience there is not very recent; Norfolk & Western—in fact, roads in this part of the country.

By MR. DEMMING:

Q. The Delaware, Lackawanna & Western?

A. Only from observation.

Q. From what you saw of this siding and the conditions surrounding this siding, should or should not a derailing device have been installed upon this siding?

(Objected to as stating a conclusion.)

(Objection sustained.)

Q. Was this siding such a siding as would come within the rule based upon your experience and knowledge, as requiring a derailing device?

(Objected to. Objection sustained.)

(Exception to plaintiff.)

THE COURT: The question as to whether a device should be placed at any particular point I do not think is a question for an expert. He can describe the situation, and you can show what the usual and ordinary devices are, and the facts and circumstances, and then I take it it is a question for the jury; at any rate, I suppose that is the safest view to take.

Q. Is this what you call a siding approaching a main line on a down grade, Albion siding No. 2?

A. Yes.

Q. At the time this accident happened on July 21st, 1909, what was the ordinary and customary practice with regard to such sidings on railroads?

(Objected to, because the witness has already said he left the railroad service some years before, and simply got into interurban trolley lines.)

(Objection sustained. Exception for plaintiff.)

Q. On July 21st, 1909, what was the ordinary and customary practice on railroads with regard to installing derailing devices on a siding approaching a main line on a down grade?

(Objected to. The witness has not qualified, and said he had nothing to do with railroads for some years prior to July 21st, 1909; also as leading.)

By THE COURT:

Q. How long have you been there?

A. I have been railroading since 1886, and of course while I have not been actively in practice and in the employ of any steam railroad, I use the steam railroads a good deal, and I am building interurban roads.

Q. Steam railroads?

A. No, electric roads.

Q. How long has it been since you know anything about constructing steam roads?

A. I have not lost touch of them, and I have not lost my power of observation. I know just as much about the practice in steam roads now as if I was actively at work on them, probably a good deal more, because I have an opportunity for a good deal wider observation.

{Objection overruled. Exception for defendant.)

(Question repeated.)

A. The ordinary practice was to put in a derailing switch.

Q. Just explain what a derailing switch is.

A. A derailing switch is a switch set in the siding with the point facing toward the car, that is so that when that is open a car approaching that will leave the track and run on the ties.

Q. And this derailing device being placed on the siding of course catches the wheels of the car when they begin to move?

A. It will deflect the car off the rails before it reaches the main track.

Q. It doesn't necessarily mean ditching the cars; it would simply catch the wheels?

A. It would not actually ditch a car, because they do not acquire a high rate of speed by the time they leave the track, and usually they run on the ties a short distance.

Q. Is it a matter of comparative ease then to push the cars back on the track, pull them back?

A. Well, yes; it isn't as serious a matter as if the car were ditched.

Q. What is the cost of it?

(Objected to.)

THE COURT: That may be a material ques-

tion, to submit evidence to show the cost, because a railroad is not required, as a general practice, to go to extraordinary costs in installing individual machinery, but if it can be shown that the machinery or devices are of the ordinary and reasonable kind, it is a matter to be inquired into.

(Objection overruled. Exception for defendant.)

A. I have put in derailing devices for as little as \$25 a point.

Q. There are several kinds of them, are there not?

A. No; they are substantially all the same.

Q. I mean some of them are carried around with them on the trains and they just put them over the rail, and others are installed like a switch?

A. You mean a wrecking frog?

Q. Yes; they just put them on the rail and screw them on, that is, the Scotch block?

A. I have not seen those used in that way.

Q. Those are less expensive than the others?

A. As I say, I have never seen those used in that way.

Cross-examination.

By MR. CAMPBELL:

Q. You say you graduated from the University of Pennsylvania in 1887?

A. Yes, sir.

Q. You were then employed with the Philadelphia & Reading Railroad Company, I believe it was, then?

A. Railroad Company.

Q. In what capacity?

A. I was rodman.

Q. Where, what division?

A. I was on the Philadelphia Division.

Q. Did you have any mountainous grades around Philadelphia that required derailing devices during that employment?

A. I worked up as far as Pottsville and Tamaqua.

Q. The Philadelphia Division doesn't go up around Pottsville, does it?

A. No.

Q. The Philadelphia Division is confined to the City of Philadelphia?

A. No; the Philadelphia Division runs up the Schuylkill River.

Q. You say your division went up as far as Pottsville?

A. I said I was occasionally sent up to work on sidings as far as Pottsville and Tamaqua while regularly employed on the Philadelphia Division. At that time all the divisions did not have a full engineering corps.

Q. Were the switches into the main line between Pottsville and Philadelphia equipped with derails at that time?

A. In 1886?

Q. In 1886.

A. I have no recollection of putting in any derails in 1886.

Q. When was your first recollection of any being put into the old Philadelphia road on that line?

A. I did not personally put any in.

Q. Your next employment was with the Baltimore & Ohio Railroad. What division were you employed on there?

A. Between Philadelphia and Wilmington.

Q. What mountainous districts did you have between Philadelphia and Wilmington that require derails?

A. There were no mountainous districts, but derails are not necessarily confined to mountainous divisions.

Q. What sidings have you approaching a main line between Philadelphia and Wilmington that require derails?

A. The sidings from the quarries near Lieperville at that time, which I think have been changed.

Q. Do those sidings all have derails?

A. No.

Q. On all sidings approaching a main line on a down grade between Philadelphia and Wilmington during the time of your employment, did they have any derails?

A. No; I said my first acquaintance with derails was in '90 or '91.

Q. When did you first go with the B. & O.?

A. In the latter part of 1887.

Q. You were with the Philadelphia & Reading in 1886?

A. Yes.

Q. How long were you with the Baltimore & Ohio?

A. Only a comparatively short time; four or five months.

Q. Then you went with the Construction Department of the Pennsylvania Railroad?

A. Yes.

Q. Where was your division then?

A. The Pittsburg Division. I had charge there of the building of a bridge into Johnstown.

Q. You were equipping sidings with derails under that employment?

A. Not at that time. That was in 1887 or 1888.

Q. Were all sidings approaching a main line approaching a mountainous district equipped with derails?

A. Not at that time.

Q. Your last employment with any other railroad after 1887 was when and where?

A. I equipped with derails—

Q. No, answer my question; what railroad did you go to, after the Pennsylvania Railroad; to what railroad did you go after leaving the Pennsylvania?

A. I had charge of some work in Philadelphia and in New York City.

Q. That of course did not require derails?

A. No.

Q. Then you went where and when?

A. Then I went to Illinois.

Q. To the Illinois Central?

A. No; I was working then for the Union Switch & Signal Company. That was at the time when I first became acquainted with derails, and their installation.

Q. And their business is the manufacture and installation of derails, is it not?

A. Incidentally.

Q. Amongst other things?

A. Certainly.

Q. What railroad company were you employed with after that; you said the Wilkes-Barre & Easton?

A. Yes; and the Norfolk & Western.

Q. When did you go with the Norfolk & Western?

A. In 1889 and '90. No, pardon me. In '91 and '92.

Q. Were the Norfolk & Western installing derails at that time?

A. They were to some extent. Not under my personal charge. I was putting in sidings at the time.

Q. You still had your great powers of observation at that time; did you notice whether or not the sidings approaching their main line were equipped with derails?

A. No; some of them were not. Some were on ascending grades, and some were practically level. They were beginning to come into use then. They were not as common then as they are now.

Q. Your next railroad was the Wilkes-Barre and Easton?

A. Yes.

Q. That was an entirely new construction?

A. That was an entirely new construction. Except in the immediate neighborhood of Wilkes-Barre. There were comparatively few sidings on that road as we built it. The development came later.

Q. That is the line in connection with the Susquehanna & Erie system?

A. Yes.

Q. In your traveling in this interurban road business you have great chances of observation as to what has been done on grades; tell us whether or not you have seen or have not seen sidings approaching a main line on a down grade which have not been equipped with derails?

A. I have seen occasional ones, but the usual practice was probably six or eight out of every ten.

Q. There are some sidings where the cars do not approach a main line that are not so equipped?

A. Yes, there are.

Q. Now, supposing cars on a siding such as you described here at Albion No. 2, are braked and blocked in such a way that they could not possibly get out, every wheel blocked, if you want, can you tell me of what use a derailing device would be in that case?

A. If I could be sure that the brakes—

Q. You are sure that the brakes are perfect.

A. Assuming then that the brakes are absolutely perfect, that there is no spring in the tracks, that the shoes are in good condition, that the tracks are dry, and that every wheel is blocked, a train will stay there. It does not need—

Q. Assume all that.

A. Assuming absolutely ideal conditions you do not need any other protection.

Q. A derail device would be absolutely useless?

A. For that particular train.

By MR. DEMMING:

Q. In other words, you have to assume a large number of conditions to be absolutely perfect before you can let cars stand on a siding such as has been described, with the car approaching a down grade to a main line without a derailing device with safety?

(Objected to.)

THE COURT: The rule of evidence in regard to hypothetical questions is that a hypothetical question to be properly admissible must be based upon the facts in evidence in that particular cause. Now, there is a dispute here. I have no doubt that it is going to be contended that there is quite a dispute as to the exact conditions of the braking and blocking of that car, and therefore I admitted without discussion or remark your hypothetical question which assumed a condition where every wheel of the cars was blocked, and the tracks were all in good condition, and he said that under those circumstances it could not get away. Now, the plaintiff asked the question whether it was not necessary, to come to that conclusion, to assume that everything was perfectly safe. I will admit that.

(Exception to defendant.)

Q. Answer that question.

THE COURT: I will rule that question out. I have changed my mind. We have before this jury the exact facts upon which that hypothetical question was based.

MR. DEMMING: If your Honor rules this question out, don't you think you ought to rule out the other question?

THE COURT: No; I won't rule that out.

By MR. DEMMING:

Q. You say you did not personally put in derails on the Philadelphia & Reading?

A. No.

Q. You worked there in 1887, did you say?

A. 1886.

Q. While you did not personally put them in, you know they are there?

A. I know they are there now.

Q. And they have had them there how long?

A. About four or five years.

Q. And while you did not personally put them on the B. & O., you have no doubt they are there?

A. I have been over there very little.

Q. There are derrails on the B. & O., are there not?

A. There are; yes, sir.

Q. And those derrails are on sidings approaching the main line on a down grade?

A. Yes.

Q. Other sidings, on the level, or with a descending grade away from the main line do not require them?

A. No.

Q. My friend has also tried to emphasize mountainous districts. Are derrails peculiar to mountainous districts?

A. Oh, no.

Q. The principle by which they are put in is a descending grade on a siding approaching a main line irrespective of whether they are in the mountains or anywhere?

A. Yes.

Q. You have also said on cross-examination that you have seen some sidings that were not so equipped; some sidings, I believe you said, approaching a main line on a down grade?

A. Yes.

Q. You don't know of your own knowledge whether or not cars are ever allowed to stand on the sidings?

A. I don't know anything at all about the operating.

Q. For all you know they may be sidings used for cars the same as this Albion siding No. 1?

A. Possibly.

Q. Since 1891, as I understand your answers, they have come into universal use?

MR. CAMPBELL: Objected to. He has not so said at all.

Q. Have they or have they not?

(Objected to as stating a conclusion.)

Q. Have they or have they not, since 1891 come into universal use?

(Objected to.)

THE COURT: I think we have that.

MR. DEMMING: I just want to absolutely clear that up so as to get it on the record.

(Objection sustained.)

Q. Come into universal use in this part of the country?

(Objected to. Objection sustained. Exception for plaintiff.)

Q. You walked down this line from Albion siding No. 2, from which these cars ran away, to Belfast Junction, didn't you, in company with myself?

A. Yes.

Q. That was shortly after the accident?

A. That was in 1910.

Q. Before the former trial?

A. I have the date of it. Yes, it was April 2nd, 1910.

Q. Did you observe any sidings approaching the main line on a down grade other than this Albion siding No. 2, on that walk?

A. Yes; several.

Q. In that distance?

A. Several.

Q. Were or were not all those other sidings approaching the main line on a down grade equipped with derailing devices?

(Objected to. Objection overruled. Exception for plaintiff.)

A. Yes; I noticed they were so equipped.

Q. Every siding approaching the main line on a down grade except this one particular siding from which these cars came was so equipped?

A. No; there was one other one there.

Q. Is that the one you mean? (Showing witness photograph.)

A. Yes.

By MR. CAMPBELL:

Q. How many sidings were there from Albion No. 2 switch all the way down here, the six or seven miles you went?

A. In the neighborhood of six miles. My recollection is there were nine sidings.

Q. And every single, solitary one of those sidings, except this one that Mr. Demming just called your attention to, Albion No. 1, was equipped with derails, is that right?

A. I didn't say that.

Q. Every siding approaching the main line on a grade?

A. No, not on a grade, because there were a couple I noticed that left the main siding on a main line.

Q. Where the grade was the other way?

A. The grade was away from them. Of course in that case there was no necessity for such a switch.

Q. How many were there with grades towards the main line that had derailing devices?

A. I think there were six.

Q. How many others that did not have derailing devices with grades approaching the main line?

A. I don't recall but one.

Q. That was this one, Albion No. 1?

A. I believe so, but there were two I noticed particularly that were either level or slightly away from the main line which of course were not so provided.

Q. How could you tell whether they were level or not?

A. I had a lock level with me.

By THE COURT:

Q. How about that switch, the Argyl branch of the main line, is there a derailing device there?

A. In the Pen Argyl branch?

Q. Yes.

A. No; that was supposed to be a branch and not a mere standing switch; not a siding.

Q. There is no derail there?

A. No.

Q. It is a general approach to a down grade?

A. It was a down grade, but we do not consider that in the same class with the sidings, though.

Q. You are talking about sidings?

A. Yes, sir.

By MR. DEMMING:

Q. You confined your attention to sidings where cars were customary to be left standing by themselves?

A. Yes, sir.

By MR. CAMPBELL:

Q. It is customary to stand cars on this Pen Argyl branch, isn't it?

A. I presume they do up there at the upper end of the station.

Q. Anywhere along there, on that down spur they always stand them there, don't they?

A. Don't they usually keep that clear so as to get the cars up to their platform?

Q. There is no derail from the Pen Argyl branch to the main line, is there?

A. No.

Q. And on a small spur branch of that kind, isn't it customary among railroads to use them for storing cars?

A. Not for a storage track.

Q. Just as you use a switch?

A. Not if there is a town and a platform at the other end of it.

By MR. DEMMING:

Q. On the Pen Argyl branch they run passenger trains, don't they; you saw one when you were up there?

A. One.

Q. That is part of the main track?

A. Well, so far as it reaches the town of Pen Argyl.

Q. It isn't a siding?

A. Not a siding.

MR. CAMPBELL: I move to strike out all of Mr. Weeks' testimony about these derailing devices, inasmuch as Mr. Demming has not come up to his offer.

MR. DEMMING: Objected to, because I have come up to my offer as to the customary and ordinary devices at the time of the accident.

(Motion overruled. Exception to deferdant.)

JOHN I. RIEGEL, having been duly sworn, was examined and testified as follows:

By MR. DEMMING:

Q. Where do you live?

A. Scranton.

Q. What is your business?

A. Civil engineering, in practice for myself.

Q. Have you an office there?

A. I have.

Q. What college are you a graduate of?

A. Lehigh, '92; civil engineering course.

Q. Just tell us what experience you have had since then?

A. After leaving college I entered the service of the Lehigh Valley Railroad Company and became acting division engineer. I entered the division of construction and drafting work, and later became division engineer of the Auburn Division. I then became chief designing engineer. With them for seven years. I then entered the service of the New York Central Rail-

road Company in 1899, became chief designing engineer. Later was appointed district engineer in charge of construction and renewals, in the New York District. I then entered the service of the Delaware, Lackawanna & Western Railroad Company as division engineer.

Q. This defendant company?

A. The defendant company, extending from Portland through to Oswego and Utica, perhaps over half the mileage of the road. I was with the D. L. & W. for two years, extensively engaged on revision of breaker tracks, etc., in which the question of grades was continually before me, and then took service with the Delaware & Hudson Company as assistant chief engineer, and remained with them for six years; also engaged in the reconstruction of the road from Carbondale to Scranton, a four track road, breaker tracks, etc. I have also been engaged with other corporations on construction of railroads and industrial affairs.

Q. Have you been used as an expert by this defendant company?

(Objected to.)

THE COURT: Just go along in the ordinary way.

MR. CAMPBELL: We admit he is an expert.

By MR. DEMMING:

Q. Are you acquainted with the siding where these cars started to run away?

A. I am, I was over it as early as 1893 and 4, and since.

Q. How long has the road been owned by the Delaware, Lackawanna & Western?

A. Since 1891.

Q. Will you tell the Court and jury in your own way just what the conditions are with regard to Albion siding No. 2, and in that neighborhood?

A. I shall begin my description at the Pen Argyl Junction, where the branch leading to Pen Argyl sta-

tion leaves the main track of the Bangor & Portland railroad on the crest or summit of a little hill, from which the grades of the main line run both ways on a considerable descent. The grade of the Pen Argyl branch ascends to the northeastward into the town on approximately a one per cent. grade. After leaving the Junction I should judge a distance of five or six hundred feet the Albion siding No. 2 leads from this branch to the right to a storage place for loading slate from one of the quarries. There is a drop in the ascending grade approximately 100 feet beyond the point of frog. The upper end of the track is at a slightly greater grade than the main portion of the track.

Q. With reference to quarries, are there quarries in that neighborhood?

A. There are; at points from approximately 30 feet from the Bangor & Portland branch of the main line to Myles there are several there; they are common.

Q. What kind of quarries?

A. Slate quarries.

Q. Large quarries or small?

A. Two of them are medium quarries, and one I didn't look into particularly, but I should say it was a large quarry.

Q. Each quarry employed quite a number of men?

A. It did.

Q. There is a grade from Pen Argyl Junction on the main line down towards Nazareth, is that a descending or an ascending grade, or what?

A. It is a descending grade, level near the summit of course, and gradually runs on a vertical curve and becomes quite a steep descent about a quarter of a mile from the Junction, approximately a one per cent. grade I should say; some levels.

Q. By a one per cent. grade you mean a rise or fall of one foot in a hundred?

A. One foot in a hundred horizontal.

Q. What is the grade of Albion siding No. 2 from which these cars came?

A. It is nearly level, or practically so on the lower end for one hundred feet; after leaving the point of frog, then it seemed a vertical curve and the grade approaches one per cent. or slightly in excess of that. Then from there there is about a one per cent. grade for 200 feet or a trifle over. Beyond that it is somewhat less than one per cent., approximately 8-10th.

Q. Do you know of your own knowledge whether at the time of this accident there was any derailing device on Albion siding No. 2?

A. I do not.

Q. Do you know the grade on West Albion siding as compared with Albion siding No. 2?

(Objected to.)

Q. I will put the question this way: Albion siding No. 2 and West Albion siding, are they not sidings approaching the main line on a down grade?

A. Albion siding No. 2 is a single ended siding approaching the Pen Argyl branch on a down grade. West Albion siding is a siding that extends across the crest or summit of the hill and approaches the main line by both ends at descending grades.

Q. That is, the opposite ends of that siding go away from each other?

A. They do.

Q. The water shed or top of the grade is somewhere in that siding?

A. About the middle of the siding, and probably to the eastward.

Q. It has been testified to here that there was a derailment on Monday, the 19th day of July, of a car in a train, and that three cars immediately in front of that car which was derailed were taken out of that train and coupled on to three other cars that were found standing on West Albion siding. When this derailment occurred the train was going at the rate of

about eight miles an hour, and was suddenly stopped, of course, on account of the derailment. The only test made of the three cars which were taken out of the train on which the derailment occurred, as to the condition of their brakes, both hand and air brakes, was the putting on of these brakes, and these six cars were then put upon Albion siding No. 2 and left to stand there without any other test being made with regard to the braking apparatus. Would or would not that be a safe thing to do with regard to the brakes on those cars, and those brakes holding?

MR. CAMPBELL: Objected to, because the witness in the first place has not been qualified about brakes, and don't know anything at all about them so far as we know, he being a civil engineer engaged in construction work.

(Objection sustained. Exception to plaintiff.)

THE COURT: It is not necessary to have expert testimony on that. Hypothetical questions are only admissible when the facts in the case require scientific and expert testimony. I doubt whether there has not been a mistake made already in admitting expert testimony.

Q. In a derailment in the running of a car such as has been described, at or about the rate of eight miles an hour and suddenly stopping, would or would not a severe strain be put upon the brakes of the cars of that train?

(Objected to. Objection sustained. Exception for plaintiff.)

Q. If three cars are taken out of such a train after a derailment and left to stand together with three other cars which are found upon a nearby siding, upon Albion siding No. 2, without any test being made of their brakes, more than a mere hurried putting on of the brakes, even though they are put on hard, is or is

not that a safe thing to do with reference to the main line?

(Objected to. Objection sustained. Exception for plaintiff.)

Q. What has been your experience with regard to derailing devices?

MR. CAMPBELL: I think I shall have to ask for an offer in this case.

MR. DEMMING: My offer as made before will apply to this witness.

(Objected to. Objection sustained. Exception for plaintiff.)

THE COURT: How are we interested with his experience on derailing devices?

MR. DEMMING: I asked the witness what he knows about them.

THE COURT: You can ask him that.

Q. How long have derailing devices been in use?

A. During all of my engineering practice and for some time before.

Q. That began in 1892?

A. Really in 1887. I was employed in the construction of a branch line in the slate belt back of Slatington.

Q. Under what conditions were derailing devices used in 1909 at the time this accident occurred?

A. In the first place, on tracks that were considered extraordinarily dangerous, which are such tracks as lead on a considerable descent into a main line, or from a series of tracks that finally lead into a main line, one derailing device was considered sufficient. Later they were installed on every side track that led to a main track or passing track which led by a descent to the main line, and on which cars should be left standing for the operation of the road. Later they were added as a matter of safety for switching purposes, so

as to save fouling the main line, whether or not the side track lay on any lead or not.

Q. You have said "later" twice in your answer. Do all these times refer to times previous to July 21st, 1909?

A. They do, five and eight to ten years.

Q. Before July, 1909?

A. They do.

Q. On July 21st, 1909, the day of this accident, what was the ordinary and customary practice on railroads with regard to sidings approaching or leading to the main line on a down grade?

(Objected to as leading and stating a conclusion and calling for testimony that this witness is not competent to give, because he has only been employed by several railroad companies.)

(Objection overruled. Exception for defendant.)

A. Derails were provided on all descending tracks into a main line passing track as a matter of protection, and recommended by the engineers, and we indicate that in all our literature. They were quite universal in all hilly countries.

By MR. CAMPBELL:

Q. Did you get that from some book?

A. By engineering literature I have not covered the entire railroad world. I am speaking personally of the railroad practice of all eastern and northeastern Pennsylvania. As far as I know the practice has been general to install the derails.

By MR. DEMMING:

Q. And for how long previous to July, 1909, had this been the ordinary and customary practice?

A. From about 1896 or 7, when the Railroad Commission of New York State permitted the railroads to put two ended tracks into a main line.

Q. From 1896 or 1897?

A. Before that date.

Q. Twelve or thirteen years previous?

A. Yes, sir.

Q. Tell us what a derailing device is; have you photographs of one here?

A. I have photographs of two. There are many derailing devices.

Q. Just explain to the Court and jury from those photographs what they are.

(Photographs handed witness.)

A. I have one photograph of what is called a split point or derailing switch. It is simply one point placed over the ordinary, or placed against one of the rails, which is called a stop rail, in such a manner that the point can be deflected from the stop rail and in that way guide the flange in descending the track so as to derail one wheel or two wheels on one side of the truck if the velocity is not very great, and possibly one car if the velocity is about 8 to 12 miles an hour.

Q. Then it doesn't mean the ditching of a car?

A. They seldom ditch except when the trains go at a high speed. This device follows the first derailing device, which was simply a break in the rail by which one end of the rail was set away from the end of the rail next adjoining.

Q. Ordinarily then just a wheel, or at the outside, a truck of one car goes off the track, and that is sufficient to stop the cars?

A. That is sufficient to stop under ordinary conditions.

Q. And it would be quite easy to put a car back on the track again?

A. It is; it isn't much of an effort.

Q. It doesn't mean the wrecking of the car?

A. It does not.

By THE COURT:

Q. That isn't put at the junction, though?

A. No; it is some distance back of the frog, sufficiently far to clear the main line.

By MR. DEMMING:

Q. What is that? (Referring to photograph.)

A. That is in common terms called a Scotch block.

Q. Just explain that.

A. It is a stop block by which a trainman can throw a piece of iron upon the top of the rail and in that way catch the flange of the wheel and throw the wheels off to the side of the track clear of the main track. There are other forms of this device by which sometimes simply a hinge can drop over, and that can be removed to permit the car to go by there in the ordinary switching arrangement. There are probably a dozen forms of that kind.

Q. How many forms of derailing devices are there altogether?

A. I should think there are two dozen at least.

MR. CAMPBELL: Don't think.

A. I know of a score.

Q. How expensive are they?

A. They vary, including the installation, from \$8 or \$9 to \$26 for the split point is our ordinary estimating value, and up to, in case they are coupled with the main line switch, \$700.

Q. The kind that are employed with the main line switch, by that kind you mean when they operate the ordinary switch, the same lever throws open the switch and the derailing device both, is that what you mean?

A. That is what I mean, yes.

Q. That makes it absolutely safe?

A. It assures the transportation department that a man don't leave the derailing device closed after placing the cars and allow them to move down the track.

Q. How are they with regard to operation; are they simple in their operation by the trainmen?

A. Very simple.

Q. Just explain how they are worked.

A. The first installation, and the original form, the derail form referred to, requires the throwing of a lever one way or the other. There are four or five arrangements for doing that. The second illustration shown is by sliding out this casting so as to lift it to the rail. They are those that the hinge drop over and are locked in place after the men leave them so that it cannot be tampered with.

Q. Why is it necessary, in your judgment, to have a derailing device on a siding approaching a main line on a down grade?

(Objected to.)

Q. What reasons enter into that?

(Objected to.)

Q. Based upon your engineering experience?

(Objection sustained. Exception for plaintiff.)

Q. After cars are put upon a siding such as these six loaded gondola ash cars, and the brakes are put on hard,—turned hard,—and the block, or we will even say the blocks are put under the wheels of those cars, is or is not that a safe condition on a siding approaching a main line on a down grade?

MR. CAMPBELL: Objected to. He has not qualified as an expert upon brakes.

THE COURT: I will rule it out upon the ground that it is a question for the jury.

(Exception for plaintiff.)

Q. Can you detect defects or kinking or anything say in the braking apparatus which would prevent the shoe from catching hold of the wheels, by simply turning the brake wheel hard?

(Objected to. Objection sustained.)

Q. Are you sufficiently experienced with brakes to answer questions with regard to brakes?

(Objected to.)

Q. If so, state that experience.

(Objected to the form of the question.)

By THE COURT:

Q. What has been your experience?

A. It has been necessary for me to inform myself as to the operation of brakes in order to know what conditions to meet and what arrangements to make in handling cars with brakes, for fifteen years at least, in reference to switches and ordinary contrivances for the safety of operation. I have studied the reports, etc., of all the experts. I have examined the brakes myself and know the conditions under which they operate and the difficulties we must contend with.

Q. You can tell all you know about brakes.

By MR. CAMPBELL:

Q. What brakes were on these six loaded ash cars you are going to testify about just now?

A. I know nothing except by hearing the testimony.

Q. What did you hear about what kind of brakes these were, who manufactured them? Let us know all about these brakes now.

A. There were air brakes on the car and equipped with hand operating devices as well.

Q. Is there only one kind of air brake?

A. There are three.

Q. What kind was on this car?

A. I don't know.

Q. In what state of repair were they? You don't know anything about it? You are going to testify to something you don't know anything about?

A. I don't know anything about these particular brakes.

By MR. DEMMING:

Q. What condition were these brakes in; are the same principles applicable to all brakes in general?

A. They are; the general principles are all outlined for us by the master carbuilders' association and adopted as standards by the railroads.

Q. One kind of principles apply to air brakes and another kind to hand brakes?

A. They do, and whether or not there are two operating devices on the hand brakes, whether or not they are hand brakes operating from both ends, or single ends of the cars.

Q. Now, based upon these general principles, which you say are applicable to all brakes, and remembering that it has been testified to here that there were on these six cars hand brakes and air brakes both, can you tell,—can anyone tell by merely putting on the brakes hard, whether or not they are in good condition on those cars?

(Objected to.)

MR. CAMPBELL: I would like to cross-examine him as to his competency.

THE COURT: You may cross-examine him.

By MR. CAMPBELL:

Q. What are the reports on brakes which you said you heard so much about since your college experience?

A. The Master Car Builders' Association. They enter into that. They enter into a discussion of them practically every year. The Western Railway Club discuss the matter practically once a year. I am a member of the Western Railway Club, and the New York Railroad Club has also had discussions on the matter.

By MR. DEMMING:

Q. Have you got some of those discussions here that will help our friend out?

A. I have a copy of the discussion in '99.

By MR. CAMPBELL:

Q. Don't you know that the Master Car Builders' Association at their conventions at Atlantic City and Los Angeles and other places, didn't say anything at all about air brakes? That is done by the association called the Air Brake Association; you know that, don't you?

A. I do. The members of one are members of the other as well.

Q. You say you belong to the Air Brake Association?

A. No, I do not.

Q. You say there are two or three kinds of air brakes?

A. Yes, sir; the New York and Westinghouse are the most common ones.

Q. You say while you were at Lehigh University you afterwards went into the Lehigh Valley Railroad and entered the engineering division?

A. Yes, sir.

Q. What did you have to do with air brakes there in the engineering division, anything?

A. Nothing.

Q. What did you have to do with air brakes when you got up in the Auburn Division of the Lehigh Valley, anything?

A. I was obliged to know considerable about air brakes, the operation of the air brakes, that is, the general principle of the brakes used on the Lehigh Valley.

Q. You afterwards went to the Lackawanna & Western Railroad. What did you have to do with air brakes there, or brakes?

A. There I was engaged in the reconstruction of the breaker tracks, and I had to know how the brakes acted on the breaker tracks and standing on grades, and whether or not reliance could be placed upon them, especially so in order to arrange for the location of de-rails.

Q. Didn't you always when you were called upon to do anything, go to somebody else and consult them?

A. I would often consult individuals and often consulted literature.

Q. But more often than otherwise? While you went out in the mountains do you ever recall when you consulted anybody as to what load brakes could carry, and what tonnage they could hold on the mountains?

A. I informed myself on the matter, yes.

Q. Just as we all do in reading books and things of that kind, just for mental diversion?

A. No, not for diversion.

Q. That isn't part of your business?

A. It was my business to know what kind could be adopted safely.

Q. Did you ever act as brakeman with hand brakes?

A. Not sufficient to say I was a brakeman. I have operated them and been injured and learned a few things in my early days.

Q. You learned to keep away from them. So you don't think you would cover the strength necessary to apply hand brakes to say as to what their efficiency were?

A. Yes; to quite an extent I would.

Q. Mr. Demming endeavored to ask you certain questions about these loaded ash cars which were upon this Albion siding No. 2. Did you ever inspect any of those cars?

A. I did not.

Q. Did they have double hand brakes?

A. I don't know; not those particular cars.

Q. Do you know what kind of air brakes they had?

A. I do not.

Q. Or what sort of shoes the brakes were equipped with?

A. No.

Q. Or when they were put in there?

A. No.

Q. Do you know when the cars were put in the shop?

A. I do not.

MR. CAMPBELL: I object to this witness testifying to anything about the brakes upon these cars.

THE COURT: The evidence is that these cars were braked and blocked, and that they held from the day before to near eight o'clock the following morning, and the question put to this witness has nothing to do with the facts and circumstances in this case.

(Objection sustained. Exception for plaintiff.)

Adjourned to tomorrow, November 14th, 1911, at 10 a. m.

Before HON. JAMES B. HOLLAND and a Jury.

Philadelphia, Pa., November 14, 1911,
10 a. m.

Present:

GEORGE DEMMING, Esq., for plaintiff.

JAMES F. CAMPBELL, Esq., and L. A. OLIVER,
Esq., for defendant.

MR. DEMMING: One of the objections made to the qualification of Mr. Riegel as an expert on brakes, was that he did not know whether there were brakes on both ends of these cars. I want to recall Mr. Grupe to ask him that question.

MR. CAMPRELL: Mr. Demming failed to qualify the witness yesterday. Are we going to reopen the question now? Your Honor overruled any expert testimony about the brakes.

THE COURT: I did not rule it out on the ground that he was not competent to answer. I did not rule that he was not sufficiently competent to answer. I ruled it out upon the ground that the hypothetical question did not involve the facts. You asked him the question whether a man could tell whether a brake was in good repair by putting it on, simply by putting it on.

MR. DEMMING: Putting it on hard.

WILLIAM H. GRUPE, recalled.

By MR. DEMMING:

Q. You have been sworn?

A. Yes, sir.

Q. On these six cars that were put in on Albion siding No. 2, and which ran away on the 21st of July, on which ends of the cars were brakes?

A. I could not tell which end. There was a brake on one end.

Q. Only on one end?

A. Yes, sir.

Q. Each car had an air-brake?

A. Yes, sir.

Q. In addition?

A. Yes, sir.

Q. What make of air-brake?

A. That is something I could not tell you.

Q. The ordinary air-brake you find on those cars?

A. Yes, sir.

Q. You made no examination of these brakes at all?

A. Not any more than put them on, this is all.

Q. No examination of the ratchet wheel or the chain, or the brake shoes?

A. No, sir, the ratchet wheel and brake shoes were all right.

Q. So far as you could see them?

A. Yes, sir.

By MR. CAMPBELL:

Q. Could you see them?

A. Yes, sir.

By MR. DEMMING:

Q. Standing up, on the sill?

A. Yes, sir.

Q. Did you ascertain whether or not they were worn, the ratchet wheel and the dogs?

A. How is that?

Q. Did you ascertain whether or not the ratchet wheels and the dogs were worn?

A. No, sir, they were not worn. They were all right.

Q. You did not get down on your hands and knees to examine them?

A. No, sir.

Q. Did you put the brakes on until the wheels would not turn any further?

A. I could not pull them any further.

By MR. CAMPBELL:

Q. Did you put the wheel on hard?

A. As hard as I could pull it.

Q. You are a pretty strong man?

A. Yes, sir.

Q. It is not necessary to go down on your hands and knees to examine the dogs or the ratchet wheel?

A. No, sir.

Q. You could see from where you were?

A. Yes, sir.

Q. You say they were in good condition?

A. Yes, sir, they were all right.

Q. What is the dog, the little thing you push in with your foot?

A. Yes, sir.

Q. That was in good condition?

A. Yes, sir.

Q. The ratchet wheel was all right?

A. Yes, sir.

Q. You do not use air-brakes when you are setting cars in a siding like that, do you?

A. No, sir.

Q. It is not in use at all except when the cars are coupled to the locomotive?

A. That is all.

Q. And the cars were not coupled to the locomotive, at least your car was not coupled—

A. No, sir.

Q. When you were braking those cars?

A. No, sir.

Q. You also said in your examination-in-chief and cross-examination that the brakes you put on would hold six cars?

A. Yes, sir, the brakes I put on would hold six cars.

Q. No doubt about that?

A. Yes, sir, no doubt about it.

By MR. DEMMING:

Q. Did you bleed the air?

A. No, sir.

Q. Did you brake the cars off from the engine?

A. I did not use any air.

By MR. CAMPBELL:

Q. The air was not cut in at all?

A. No, sir.

By MR. DEMMING:

Q. The dogs and the pawl are the same. Do you know what a pawl is?

A. I do not know what that is.

Q. The blocks on the ratchet wheels may have been worn and you not observe them standing up?

A. They were all right as far as I knew.

Q. So far as you knew?

A. Yes, sir, they held all right.

Q. You did not notice whether the ratchet wheel was loose on the staff?

A. No, sir, it was all right.

JOHN I. RIEGEL, recalled.

By MR. DEMMING:

Q. In regard to your qualification, you testified about brakes. Have you made a study of brakes at any time?

MR. CAMPBELL: Objected to. That was all gone into yesterday fully. I object to any re-direct examination upon the point.

MR. DEMMING: Do you still object to his qualification?

MR. CAMPBELL: Yes, sir.

THE COURT: I think he is qualified to answer any question about brakes.

(Exception noted for defendant by direction of the Court.)

MR. DEMMING: I want to say at this point that I want to ask the witness the question whether this same defendant company did not use him as an expert on brakes within the last two weeks?

(Objected to.)

THE COURT: If he is qualified as an expert he can qualify before this Court and in this case. It does not make any difference to us what they did somewhere else with him. If you think that you

want to show any more information he possesses I will permit you to do it.

MR. CAMPBELL: I will withdraw the objection as to when he was examined.

By MR. DEMMING:

Q. Tell us what qualities enter into the operation of brakes on railroad cars; what conditions?

A. On railroad cars?

Q. Yes, sir.

MR. CAMPBELL: My objection to all this examination is that the gentleman has not been qualified as an expert.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

A. The manner of placing the cars, the action of the brakes between the brake shoes and wheels, and between the wheels and the ratchets of the brakes; the grade and so forth of the track and the condition of the tracks under various conditions. They are all conditions?

By THE COURT:

Q. What was that?

A. The condition of the tracks—

MR. CAMPBELL: I ask that that answer be stricken out for the reason that it does not assume the facts in this case.

MR. DEMMING: We are coming to the facts in this case. I begin with general principles first.

THE COURT: That is a question for the purpose of informing us how the brakes operate. I think that is all right.

(Exception noted for defendant by direction of the Court.)

By MR. DEMMING:

Q. Have you finished your answer?

A. Yes, sir.

Q. Do you include in that the conditions which enter into the release of the brakes also?

A. That would be a matter of condition of repair of the brakes.

Q. How about brakes releasing themselves; what condition enters into that?

A. The same conditions as I have already stated, the position in which the car is located, the amount of grade and the manner in which the cars have been braked and the condition of the repair of the brakes.

Q. Does temperature enter into that?

A. To a considerable extent if the temperature varies much.

Q. The condition of the track, of the rails, so far as being wet or dry, does that enter into it?

A. Very materially. The holding power of the brakes depends entirely upon the friction between the wheel and the rail, the same as the adhesion does to move the train by means of the locomotive or the power.

Q. If the rail is wet by rain, or by heavy dew, what effect has it?

A. If the rail is wet and clean there is no difference between the friction than over a dry rail; but if slightly moist or frosted, or covered with dew and vegetable matter, then there is considerable difference between the ordinary friction of the rail and its friction under those conditions.

MR. CAMPBELL: I object to this examination. It has nothing to do with this case.

THE COURT: I do not see what relevancy it has either.

By MR. DEMMING:

Q. Is that a diagram you have made?

A. It is.

Q. You have heard it testified that the cars in this case were equipped with hand brakes at each end—I mean were equipped with hand brakes on one end, and also equipped with air brakes? Have you made a diagram illustrating how those cars are so equipped, how a brake on that car so equipped would operate?

MR. CAMPBELL: Objected to unless it is shown that the cars in question were equipped in exactly the same way as that.

By MR. DEMMING:

Q. You are acquainted with the cars on the Delaware, Lackawanna and Western Railroad, these gondola coal cars?

A. Yes, sir.

By MR. CAMPBELL:

Q. Of that class and description?

A. Yes, sir, most all their equipment.

By THE COURT:

Q. Were you acquainted with the make of these cars that ran away?

A. Not at all.

THE COURT: What is the use of going into cars generally? What we are interested in is the cars that ran away.

By MR. DEMMING:

Q. Are the cars made like those that ran away, equipped in the same general manner, so far as brakes are concerned?

MR. CAMPBELL: Objected to because he says he knows nothing about the cars that ran away.

By MR. CAMPBELL:

Q. You never saw the cars that ran away?

A. Not to my knowledge, no.

By MR. DEMMING:

Q. Are cars of that description equipped in the same general way as far as brakes are concerned?

(Objected to.)

(Objection sustained.)

By MR. DEMMING:

Q. Do you know what class of cars these were? You have heard the testimony here.

A. I have heard the testimony that they were gondola cars of sixty thousand capacity, hopper cars, that were equipped with air brakes and hand brakes at one end, and air brake equipment and that they were the equipment in use about 1909, and therefore should conform at least to the standard car builders equipment.

Q. There was a standard at that time for such cars?

A. Yes, sir, there was.

Q. Is that diagram you made in conformity with that standard?

By MR. CAMPBELL:

Q. Did the cars upon the Lackawanna Railroad Line have one certain standard?

A. They have various standards. Some of them are old and are put into service for service like this—simple—used in hauling ashes.

Q. You say all cars built in 1909 at the company's shops and the American Car Wheel Works and all the car company works all over the country are the same standard?

A. They are not.

(Objected to.)

THE WITNESS: Sixty thousand pounds capacity, the cars on the Lackawanna are of this standard.

By THE COURT:

Q. Are of the standard with which you are acquainted?

A. They are.

By MR. DEMMING:

Q. The old standard was only forty thousand?

A. Or less. Cars of less capacity than that are inefficient. They are no longer in service.

By THE COURT:

Q. You know how the sixty thousand pound cars were equipped?

A. I do.

THE COURT: The testimony is these were sixty thousand.

MR. CAMPBELL: I object because there is no testimony that these cars were sixty thousand pounds capacity. As a matter of fact they were not.

THE WITNESS: I heard testimony yesterday they were.

THE COURT: Go on with your questions.

(Exception noted for defendant by direction of the Court.)

By MR. DEMMING:

Q. Tell us the braking apparatus on that car, that kind of car.

MR. CAMPBELL: Which kind of car is that?

By MR. DEMMING:

Q. The kind of car you heard described here as being these six cars that ran away.

MR. CAMPBELL: Objected to because there is no description they were gondola cars.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

A. They correspond to the second and fourth diagrams shown on the exhibit.

By MR. DEMMING:

Q. Will you hold that up and explain that to the Court and jury?

MR. CAMPBELL: I object to him showing the jury any piece of paper that is not in evidence.

MR. DEMMING: He can use it to explain to the jury.

MR. CAMPBELL: No, sir, the paper will speak for itself.

MR. DEMMING: I will offer it in evidence after he explains it.

By THE COURT:

Q. What are these?

A. They are diagrams showing the brake rigging of the standard cars, sixty thousand pounds capacity.

Q. Of the defendant road?

A. Of the defendant road, yes, sir.

By MR. DEMMING:

Q. Is the braking apparatus underneath the car, under the body of the car?

A. Yes, sir.

Q. It is invisible unless you get down underneath the car and look at it?

A. Parts are visible from the side of the car. It is merely a matter of looking underneath.

Q. Explain that to the Court and jury.

A. (Referring to diagram.) Under the centre of the car is shown a cylindrical casting and piston which is intended to represent the air brake. By a thrust on the piston it moves the lever which, in connection with other levers and rods, operates the brakes. To do it there must be a fulcrum or band against which the levers abut. That is formed, in instances by the hand chain, the chain rigging of the hand brake; in other instances by the fulcrum which is provided in the car. The fulcrum is often a part of the car in the case of

the hand brakes and frequently is a part of the air cylinder itself, the rear portion of the chambers. By this diagram you perceive the circuitous route through which the power is applied from the piston and the hand wheel and how it must pass in order to be effective on the brake shoes.

Q. That rod goes over what route? When you turn on the hand brake or wheel, how is that power communicated, through what means?

A. Communication is by means of the brake staff to the brake rigging of the car, underneath the body of the car; then by means of the chain which winds about the brake staff; then through the rods which connect with the chain to the levers which are hanging at various angles and through them again, up to the other rods and levers to the brake beams of the car.

Q. On those brake beams are what?

A. Are the shoes which bear against the wheel.

Q. The shoes that finally apply the movement to the wheels?

A. That finally apply about seventy per cent., not exceeding that, of the light weight of the car to the wheels.

Q. So when we use the term "Putting on a brake", all that operation has to be gone through with, and all that power transmitted to that circuitous route before the brake is put on?

A. Double this. It must also be communicated to the other end of the car, to brake the other end.

Q. On account of a brake being at one end of the car?

A. Yes, sir.

Q. Tell us whether or not, when the brake is put on, as the term is, hard, that is, the wheel turned as far as it will go, whether or not that absolutely signifies or shows that the brake is really on the car?

A. There is no assurance that it is applied.

Q. Why?

A. The chain may have too much slack, and may bind around the brake staff. There may be false motion in some of the rods.

MR. CAMPBELL: I object to the answer and ask that it be stricken out.

THE COURT: This does not amount to anything unless you show that there was a binding of the brake band or something of that kind.

MR. DEMMING: The testimony is here, and will be further, I have no doubt, that those brakes were put on hard. That is a high sounding term merely and means nothing.

I want to show by this witness that while a brake may seem to be put on hard, there are so many conditions entering into that brake, and the different parts of that brake, that the brake really, that is the shoe, may not really be tight against the rim of the wheel, and hold the wheel, or if it is tight it may be tight only under such conditions as will allow it afterwards to slacken off, even if that brake was put on, as the railroad men term it, hard.

MR. CAMPBELL: I ask that all the testimony on that line be stricken out unless they identify these cars.

MR. DEMMING: I intend to follow that testimony up by showing by this man, as a competent engineer, an engineer of some experience on this particular road, upon other roads, that according to their experience when cars are put on a siding such as this, approaching the main line, on a down grade, although the brakes are put on hard, it is not safe to allow those cars to stay in that position for this very reason; there are so many conditions entering into these brakes that although the brakes are put on hard, that in itself does not signify those cars are going to stay there.

That is based upon the experience of these engineers, and upon their construction of the railroads in 1909.

MR. CAMPBELL: I object.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

Q. You did not finish that answer.

A. There may be materials of one nature or another lodged between the brake shoes and the wheels, and although hard at first, may become crushed later.

By MR. DEMMING:

Q. How about those conditions if the brakes are put on, as is termed, hard, and the cars are allowed to stand for any considerable length of time?

MR. CAMPBELL: Objected to. I ask that the evidence be stricken out as not following the offer.

Q. Is the length of time that the cars are allowed to stand with brakes put on, a factor entering into whether or not the brakes will hold the cars?

MR. CAMPBELL: Objected to, unless he first shows that he has had some experience in that line.

THE COURT: Suppose you show that he knows what he is talking about. That question is stricken out.

By THE COURT:

Q. What do you know about operating brakes? Tell us all about it.

A. I have had considerable experience of my own in connection with my work, and had to design my tracks to provide against running away. All the facts are not always borne to the engineer at first hand. We are obliged to rely on the results of investigations and so forth as to what there is in such a matter in cases of runaways. Results come to us very generally

through the transportation officers who give us information as best they can determine that cars have been braked and have been standing.

By THE COURT:

Q. From your experience, or from the information you have given as an engineer, and assuming that that information was correct, and in reference to presenting it and correcting it, do you find that you can correct it from the information you had? In other words, from the results you obtained in your effort to correct it, could you say now that the information you obtained was correct as to the reasons for running away?

A. I can. I verified that by correspondence and my own experience in relation with other facts.

MR. CAMPBELL: I desire to cross-examine the witness on that.

By MR. CAMPBELL:

Q. Let me have your numerous railroad experiences, some specific instances where cars ran away from a one per cent. siding. You have had a long experience since you left the Lehigh in 1902; where the cars were braked with hand brakes, and on a one per cent. siding, and where they ran away, and when? Your experience.

A. In many instances—

Q. Tell me one specific instance where you know that cars which have been hand braked, drifted away from a one per cent. siding, in all your experience in 1902, with railroads.

A. That would be quite a long story. I am pretty well confined to one per cent. grades.

Q. This is a one per cent. grade, you have testified to, have you not?

A. Yes, sir. I know the cars—

Q. Take a two per cent. grade.

A. I know that cars have run away on less than a one per cent. grade.

Q. What were the circumstances of that car or cars running away? Let us have them.

A. They were on coal tracks, loaded car tracks, on which the brake shoes were wet. They were run over the ends, the stub ends of our Powderly tracks on the D. & H. on a trifle of above an eight-tenth grade.

Q. These rails were wet at the time, and the brake shoes were wet, and the wheels were wet, and the brakes were wet at the time the brake was applied?

A. The cars were wet, but the water had not gone through to the brake shoes.

Q. Had the cars been braked before the water came in this case?

A. Yes, sir, the coal was wet, and the cars were braked to hold them and the water saturated through the coal into the brake shoes.

Q. What railroad was this?

A. On the D. & H.

Q. Where?

A. Powderly, near Carbondale.

Q. How long had they been standing there?

A. Probably four or five hours. I could not be sure as to the time.

Q. How long had they been braked, four or five hours?

A. Four or five hours.

Q. Do you know what percentage of braking power were on those cars? Did you investigate that? Was it a light pull or a hard pull?

A. No, sir; the man, as I now recollect, gave it all the pull that he could put upon it. The idea was to hold it against running over the ends.

Q. What was the percentage of the pressure of the brake shoe upon the wheel?

A. I made no tests of that.

Q. Then that car was defective in some way?

A. It was not. It was left in the service and went through after it was lifted off on the tracks.

Q. Do you mean to say, a man pulling that brake hard, and the apparatus in perfect order, that the pressure of the brake shoes upon that wheel would not have held back that car if everything was in good condition?

A. I do. It released afterwards.

Q. Released afterwards, how?

A. By sliding.

Q. Did the brake release?

A. Part of it stood and held.

Q. How could the brake release if there was a sliding going down this grade?

A. The sliding of the shoes also. It was not the rails.

Q. Do you mean to say the brake shoes won't hold a wheel tight if everything is in perfect order, if there is any sliding?

A. If everything is in perfect order they will hold.

Q. In this specific instance it was not in perfect order?

A. It was in perfect order. The man braked it, and braked it hard.

Q. If it was in perfect order is not your experience in grades of less than one per cent., that the brake would hold it?

A. It very generally does. There are times it does not.

Q. Practically always?

A. I have not said practically always. My observations in such matters are made from my experience of over fifteen years.

Q. Don't you know you brake coal cars even on a four per cent. grade every day in the year, and they hold?

A. For a while.

Q. Don't they hold whole trains of coal cars up here in the coal regions on grades considerably more than two per cent., by hand brakes?

A. Yes, sir, and trains run away, as we experienced in Scranton.

Q. Let us have some of the experiences of the trains running away, with the brakes properly set.

A. The trains running away?

Q. Yes, sir, any trains running away.

A. We had two instances nearly in close succession when I was Division Engineer of the D. L. & W. at Scranton.

Q. Was it caused by the dereliction of the man in braking the cars, or because the brakes were out of order?

A. Caused by the cars running away.

Q. Did not you investigate it at the time?

A. Yes, sir, one of the men had left his air go too low; could not retain the train after that.

Q. That is what you would call a man failure?

A. That is a man failure.

Q. Anything the matter with the brakes?

A. A man failure placing the cars.

Q. On these seven cars in question there was no air brake in use?

A. No, sir.

Q. There could not have been a man failure on account of the air pressure?

A. Unless he failed to bleed all the air out. There might have been some left in the cylinder, and this perhaps would then bear against the brake piston, that is the fulcrum, and that might result in the dropping of the chain.

Q. You are assuming that at the time the cars were put upon the siding that the air was used?

A. No, sir, that there was some air left.

Q. How long will air stay in the cylinders when the cars are not in use for twenty-four hours?

A. Between when?

Q. As far as you know there was not any in these cars?

A. As far as I know there was none.

Q. Give me an instance in which, where loaded cars

were drifted in in good condition, where the brakemen say they braked the car good and hard, and as far as they knew the brakes were in perfect condition, that those cars moved out at the time there was no wind.

A. Under perfect conditions they are more than safe.

Q. More than safe?

A. Under perfect conditions.

By MR. DEMMING:

Q. We will come back again. Does the length of time cars are allowed to stand on tracks enter into the condition as to whether or not those cars will move away?

A. Very materially.

Q. Tell us how.

A. In winding up the chain the chain may lap falsely over one link or another, and in standing, some slight change in temperature, will either slip out, so as to release, or it will sag and drop.

Q. That is even when the brake is in perfect condition?

A. It is. Not absolutely perfect, but what is known as an efficient brake. The chain, in that instance, might be too long or the links might be too large in diameter. Then the car may be so placed that the journals are not absolutely in their centre bearings.

MR. CAMPBELL: I object to this testimony.

By THE COURT:

Q. Are these matters you are relating, matters that in your experience as a railroad man have been a basis or the reason why cars run away?

A. They are.

Q. Really have been, upon experience, so found to have existed under certain conditions?

A. They are, and have been threshed out scores of times.

THE COURT: The objection is overruled.

(Exception noted for defendant by direction of the Court.)

By MR. DEMMING:

Q. Finish the answer.

A. Then the car may be so placed that the journals are not in perfect centres as to bearings whereas the brake shoes could not compress tightly against the wheels in the first instance when cars will come to a settlement, and may either release, or in instances may grow tighter. The factor that it releases is always there. Then the false motion which exists at the various fulcrums may be such that a speck of rust will yield also, and release the car to a considerable extent. Those defects and considerable others running possibly to a dozen more or less of minor details. After that we have the element of the radiation of the wheels which tend to keep the car in motion.

Q. All these elements, as we understand it, enter into the brakes that are considered safe, efficient, and without defects?

A. They are so considered in ordinary use.

Q. Are these conditions, as you have described them, well recognized by engineers in the construction and operation of railroads?

A. They certainly are, and engineers have been called upon to make provisions against their liability as far as possible.

Q. How long have they been so recognized?

A. Fifteen years and longer.

Q. What is the provision that engineers make against them?

A. Installation of safety devices, safety switches or derailing devices.

Q. And the derailing devices, such as you mentioned, you have described?

A. Yes, sir.

Q. You heard the description of these cars, and the manner in which they were loaded with ashes.

Have you calculated the pressure that these six cars would exert upon a block, such as has been described here was placed under the right hand front wheel of the first car?

A. I have.

Q. What would that pressure be?

MR. CAMPBELL: I object to that, because in that question it does not assume the pressure of the hand brakes upon these four rear cars had upon the first one, and he also said he knows nothing about these cars.

By MR. DEMMING:

Q. With the brake that has been described?

MR. CAMPBELL: I object.

By MR. DEMMING:

Q. Do you have any idea how tight these brakes were put on, or how efficient they were?

A. I do not. That has nothing to do with the pressure that is exerted toward tending to move them.

Q. If the brake was holding them it would not require much pressure on the block, would it?

A. It would not. If it were holding perfectly it would require practically none.

Q. Do you know how near perfectly the brakes were holding these cars?

A. I do not.

Q. Then how did you calculate what pressure was on the block?

A. I would not expect to answer the question except by qualifying it that I assumed none of the brakes were on and I would have the pressure on the block.

Q. You can give us the pressure on the block in case the brakes were not on?

A. In case the brakes had been released. That is all.

Q. That is all you can give?

A. The rest is an element of guess.

Q. One witness testified that the day before the block was not cut, and that the next morning about a quarter of seven, or thereabouts, that block, a 3 x 6, was cut about three-quarters through. Would that indicate the brakes were on or off?

A. I should say that would indicate that the brakes were off. That is a mere opinion however. There is nothing to base that on, other than the resistance of the timber. To cut that block there is only the gravitating action on the cars on the rails, and the force of any one that might have been in the same direction toward which the cars were.

Q. Would it indicate there were no brakes, or the brakes were on slightly, or what?

A. On very slightly, if at all.

Q. Could that condition arise within twenty-three hours, that these cars had been left standing there over night, even supposing the brakes had been put on hard, as has been described?

(Objected to.)

(Objection sustained.)

MR. DEMMING: The purpose is to show—

THE COURT: The objection is sustained.

MR. DEMMING: The purpose of this question is to show that even if the brakes might have been put on hard, as the railroad men term it, there would have been such slack in the brakes, by reason of the action of the brakes, in those twenty-three hours to allow this condition to exist.

(Objected to.)

(Objection sustained.)

(Exception noted for plaintiff by direction of the Court.)

Q. By reason of these different conditions as you have described them, entering into the action of the

brakes contending to cause the brakes to release themselves after they had been put on hard, what has become the practice of railroads? What was the practice in 1909?

THE COURT: He has given us that once or twice.

MR. DEMMING: Not in this form.

THE COURT: We do not want it in so many forms. I think one form is enough. What do you want to prove now?

MR. DEMMING: That by reason of all these conditions, as this witness has described them, the proper practice has become, and has been for fifteen years, to put on all sidings approaching the main line, or down grade, a derailing device.

THE COURT: He has testified to that. Did you not?

THE WITNESS: I did, except I might add to that that the more ancient practice then was to brake the wheels in England, and in our experience to throw blocks under the wheels. The blocks were found often to be inefficient, so it finally resulted in the derailing device.

By MR. DEMMING:

Q. Those blocks were inefficient in what way?

A. Cut through, and would not be placed properly, and would slide.

Q. The cars would cut through the blocks just as in this instance?

A. Would cut through, you say?

MR. CAMPBELL: I ask that that question be stricken out.

THE COURT: Strike that out. He does not know anything about this instance.

By THE COURT:

Q. You mean as has been testified to?

A. Yes, sir.

By MR. DEMMING:

Q. Were derailing devices in universal use, and were they customary on the Delaware, Lackawanna and Western Railroad in 1909, July?

(Objected to.)

(Objection sustained.)

(Exception noted for plaintiff by direction of the Court.)

By MR. DEMMING:

Q. Would the vibration of blasting be a condition entering into whether or not brakes put on hard would hold cars?

MR. CAMPBELL: Objected to in the present state of the record, as the gentleman has not qualified.

By THE COURT:

Q. Do you know whether blasting would affect brakes on a car nearby?

A. I do know of instances where a man braked his car—this happened to be in the mines—braked his car—

THE COURT: Objection overruled.

(Exception noted for defendant by direction of the Court.)

THE WITNESS: I know of a case where a miner braked his car, and shot off his blast, and was killed by the car getting away, running over him. There are other instances. It all depends on the force of the brake and the location in which the car is put.

By MR. CAMPBELL:

Q. That was a little mine car?

A. It was a mine car, yes, sir. It was braked.

Q. You do not know how little that man braked his car?

A. It was not so little. It was thoroughly braked. From the testimony of other men he was sure it would not run away.

Q. What sort of brakes do they have on these little mine cars?

A. Hand brakes, but the brake has a pressure.

Q. Do you know what the grade was where this car got away?

A. I do not.

Q. Do you know what the force of the explosion was?

A. That could not be calculated.

Q. Do you know what sort of explosions there are around Pen Argyl siding No. 2?

A. To some extent; yes, sir.

Q. There are explosions in slate quarries, are there not?

A. Yes, sir.

Q. They are comparatively light?

A. Yes, sir; comparatively light as far as affecting these cars.

Q. Do you know of any cars getting away by reason of explosions in slate quarries? Tell us your experience about cars getting away there on sidings near slate quarries?

A. No, I know away back in 1888 we made provision against cars running away on the Slatedale branch. That would not be due to explosions.

Q. Concussions in mines are entirely different from a concussion in the open air in the slate regions?

A. Very generally so, not always so.

Q. One is confined and the other is not?

A. Yes, sir; one is confined.

Q. You take a little coal tunnel and have an explosion back in the end of the mine it goes something like a gun?

A. Yes, sir.

Q. You do not have that condition in the open air in these slate quarries?

A. You often have changes.

Q. You have not known of any cars or brakes being affected by blasts or explosions in slate quarries. You have said that?

A. I have said it.

MR. CAMPBELL: I object to the gentleman testifying on this question.

By MR. DEMMING:

Q. The vibration of blasting is a condition entering into it?

(Objected to.)

A. Vibration is an element. If brakes are as long as they are in cars—

MR. CAMPBELL: I object to that question and answer and ask that it be stricken out.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

By MR. DEMMING:

Q. It has been testified here, after this derailment of a car on the train on Monday, the 19th of July, three of the cars were taken out of the train, and three cars immediately in front of the car that was derailed, and put upon this siding, in connection with three other cars that were found standing on West Albion siding, and no inspection were made of their brakes, of the three cars taken out of the train. Would or would not that derailment, with the train going eight miles an hour, as has been testified at the time of the derailing occurred, have any effect upon the brakes on those three cars?

(Objected to as leading.)

By MR. DEMMING:

Q. Would it have any effect?

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

A. There would be some probability of the brakes being affected by such shock. An inspection would be the protection to exercise against any defects of that nature.

Q. Would it be proper and safe, so far as the main line is concerned, to stand three cars of that sort on a siding approaching the main line, on a down grade, without such inspection?

MR. CAMPBELL: Objected to as stating a conclusion, and as leading, and asking certain conditions not in the case.

THE COURT: I do not think we want any expert testimony on that.

(Objection sustained.)

By MR. DEMMING:

Q. Supposing these cars had been braked hard, these six cars on Albion siding No. 2, and had run away as has been testified to here, would or would not the oscillation and vibration of the cars, after they started to run, tend to work loose the brakes and make them altogether loose after the cars had run a certain distance?

MR. CAMPBELL: Objected to as leading, and stating a conclusion.

THE COURT: We have no evidence that was the case.

(Objection sustained.)

(Exception noted for plaintiff by direction of the Court.)

Cross-examination.

By MR. CAMPBELL:

Q. Your experience in railroads has always been as a Civil Engineer, has it not, in the construction? Is that correct? You have never been engaged in the operation of railroads or in the operating department, have you?

A. Never in the operating department. I have, for more than fifteen years, been a continual assistant to the superintendents.

Q. As an engineer?

A. As an engineer on questions.

Q. Have you been acting as an Assistant Operating Engineer?

A. No, sir, never as that. Never on the operation of cars.

Q. Superintendents of Divisions, of course, have their engineers, and require to get certain information from them all the time. In that sense you have been acting as their assistant?

A. Very often. Many superintendents are graduated from engineering departments.

Q. You have testified to the fact that you are very familiar in the Delaware, Lackawanna Railroad system, and especially on the division running from, I think you said, Scranton to Binghampton, New York?

A. To Portland.

Q. This side of Stroudsburg?

A. Yes, sir.

Q. Tell us whether or not, when you were there, all of the sidings approaching the main line were equipped with derailing devices?

A. No, sir; many of them were not.

Q. How about all the sidings or grades approaching a through main line to the railway from Portland to Binghampton, were they all equipped with derailing devices in your time?

A. All the sidings running into the main line were

so equipped where there was a possibility for cars to run down.

Q. Take the laterals, running into the main line, are you familiar with the sidings running into those laterals? Were they equipped with derailing devices in your time?

A. What do you mean by laterals?

Q. Little branch lines running off from the main line.

A. Everything that was considered a main track, on which through movement was made, was so equipped so as not to have the main track fouled by runaway cars. We had our special instructions even to look out for it.

Q. Don't you know today there are lots of sidings around Scranton that are not equipped with derails?

A. I do.

Q. There are?

A. Yes, sir.

Q. What do you mean by your former answer that every branch line which approaches the main line was equipped with the derailing devices some years ago when you were there. What do you mean by that?

A. I mean every track entering a main line and down grades.

Q. You said every track not only in the main line, but leading tracks to the main line. Don't every branch and every siding lead toward the main line?

A. Yes, sir.

Q. Get back a little from the main line and tell me whether all the sidings were equipped with derailing devices in your time?

A. They were not. That is only necessary to throw off the car before they reach the main line. That was all that was provided for.

Q. Do you know the Gouldsburg Yard near Scranton?

A. Yes, sir.

Q. That is on a grade approaching the main line, is it not?

A. It is.

Q. Is that equipped with a derailing device?

A. It is.

Q. When was it so equipped?

A. As I recollect two tracks called east-bound tracks were so equipped in my time.

Q. When was that?

A. 1901, 1902 and 1903.

Q. About three years ago?

A. 1901, 1902 and 1903.

Q. Have you looked at it since?

A. Not specially.

Q. Are you prepared to say whether or not it is equipped now?

A. I am not. There are conditions there why it should not be equipped with derailing devices because there are cross-overs there, which are always there to clear the main line.

Q. You have made a general statement about a question of fact, not upon this expert business you have been testifying on, but you are testifying as to facts from your experience? You are testifying as to facts now. You told me that on the Lackawanna system between Portland and Binghampton on which you worked in 1901, that every siding approaching the main line and a down grade had a derail, at that time?

A. I did, on which cars were left standing in such a manner they could run away. Gouldsburg Yard was no circumstance to it.

Q. Is it not a fact that on some of those sidings that do not have a derail, that cars would be left there in emergencies?

A. Never; not in my time. Mr. Ryan was very particular about that.

Q. What is the purpose of a derail?

A. To avoid against any possible injury to either the men or the equipment on the main track.

Q. That is to take care of some possible dereliction of the employee not properly braking and blocking the cars?

A. And of the dereliction of the mechanical parts.

Q. Suppose that the brakes and blocks are in good condition, a derail is not necessary, is it, or do you expect cars to run off at derails all the time?

A. We do not expect cars to run off at derails.

Q. Therefore you provide for methods of keeping cars upon sidings so they won't run out, do you not?

A. The only thing is to direct these cars to the safety switch, which deflects the cars some distance.

Q. What is the object? Is it not to protect against what you call the human element, that is the dereliction or the negligence of the employees who put cars in upon sidings?

A. That is one element.

Q. Is not that the only one and the chief one?

A. It is by no means.

Q. Let me have the others. You said you did not expect cars to go over derails?

A. The defects of equipment and so forth. For the very reason that cars are disabled on the road and must often be set out, and must be set out at some convenient siding.

Q. If you set a car that has been disabled upon a siding, don't you block it in there so it cannot possibly get out?

A. You do not go away and leave it. You must man it even if you have a derailing switch.

Q. Suppose you have a car that is broken down, and put upon a siding, and is properly braked and blocked so it cannot get away, you do not leave a man there, do you?

A. We do not.

Q. There is no necessity?

A. No, sir.

Q. Derailing devices are simply used, as I said

before, to protect against any possible negligence of the employee?

A. That is one of them.

Q. The other one was—

A. Defect of the apparatus or changed conditions of weather, and so forth, to affect the holding power of the cars.

Q. You do not expect cars to run into the derail and on the ground, do you?

A. Yes, sir, if they run away; that is the place to run.

Q. In your experience in railroading, which has been so long, is anything said to the employees when cars run off of the track and through the derail? Are they not called down for it in some way?

A. Yes, sir; if it is due to their negligence. If they run a car through the derail, instead of closing it, then they are disciplined.

Q. Suppose, after they put cars upon the siding and leave them there, and they run away, is anything said to them?

A. Then the question of leaving them is inquired into.

Q. Is not the very thing you ask them, and go into, whether or not they properly braked and blocked those cars in there?

A. It is. The matter is provided for in the book of rules.

Q. So the railroad companies have provided a method to hold those cars in, to brake and block them?

A. They do so so as to avoid damage to the cars, or to avoid delay and expense of replacing the cars.

Q. Considerable damage is done when a car is ditched by going through the derail. Is not that true?

A. Yes, sir. Ditching, do you mean the old term?

Q. Suppose it only goes off the track. Is not that considerable trouble and expense to get back?

A. Yes, sir.

Q. You have to send for the wrecking crew, do you not?

A. In instances you will, if it is convenient, but many railroads get along without the wrecking crew.

Q. You have been testifying positively in these little questions and answers as to your expertness as to cars getting away. Did you ever hear of cars upon a switch such as Albion No. 2, that you have seen, these loaded ash cars that the brakes were in good condition, where the four rear cars were braked strongly by a great big strong man, and blocked in front, get away?

A. I never heard of such an instance.

Q. Never heard of such an instance?

A. No, sir.

Q. It would be very unusual, would it not? These cars were loaded with ashes?

A. The engineer will never so regard it. There is always a possibility of it happening.

Q. There is just a possibility. It is not a probability?

A. Yes, sir; it is a high probability.

Q. A high probability?

A. Yes, sir.

Q. You are hedging again. I said put six loaded gondola cars upon Albion No. 2, six cars loaded with ashes, a comparatively light load and the four rear cars are strongly braked, the brakes in good, efficient condition, only one per cent. of grade, and a block put under the first wheel of the first car; is it probable those cars would go away?

A. No, sir.

Q. You were testifying a little while ago about what was done in England. What is your experience in England railroads?

A. I should qualify that by saying if left long enough until they would decay.

Q. If left long enough to decay they might get away?

A. Yes, sir.

Q. About how many years would it take for them to decay?

A. Or other defects take place.

Q. Would they decay in twenty-four hours?

A. No, sir; there might be other defects that might take place.

Q. What do you think might take place and probably would take place in twenty-four hours?

A. I have indicated already the dropping of the chain and a score or more circumstances that might happen, one of which might happen to one of these cars.

Q. Take the condition of six loaded ash cars which were loaded with ashes, the four rear cars were braked by a strong man. A block was put under the first wheel; the brakes were in good condition; it was Summer time; there was no rain, and nothing is known to have affected these cars in any way. There is no evidence that their brakes or blocks or anything else were interfered with by any human element. State how, under those circumstances, those cars probably would go out. Not possibly.

MR. DEMMING: Objected to. My friend has not incorporated in the question that three of those cars were taken out of the train that had had a derailment, when the train was going eight miles an hour, the train was suddenly stopped and those cars were put off there without an inspection being made of the brakes.

(Objection overruled.)

By MR. CAMPBELL:

Q. How these cars would move out?

A. I do not so understand the testimony. Assuming that the men—

Q. Assuming what I said in the question.

A. You did not put the word "If". If the car

were braked, and so forth, then the cars could not have left.

Q. You said there were twenty or thirty reasons why these cars would probably move out. Let us have each one of them, under the conditions as stated by me in that question?

A. The cars might have been so placed on a slight irregularity in the rail that the journals would press below—

Q. That is not in the question.

A. The track, as I saw it, and it must have been for years back, was quite irregular in surface. It was so placed that the wheels would not be in their perfect bearings. In that way the brakes might be released.

Q. Leave out "Might". Get down to probability.

A. Probably could be released on that particular car.

Q. You have eighty wheels here. This is just one wheel. Get down to probabilities.

A. That affects four wheels at once.

Q. I mean forty wheels?

A. If that condition prevailed at any siding point, that would also affect some other wheels. The brake chain might have wound badly about the staff in such a way that it slid. That is highly probable. It would then drop. A change in temperature would release all the brakes considerably on one car. If that prevailed on any other cars that condition would affect those. If there was any false motion in any of those fulcrums, or any of the levers due to raising or lowering—

Q. That is taken up by the applying of the hand brake?

A. There would be the circumstance that it might seem tight at first, and would ultimately spring loose after standing.

Q. Those are the probabilities you expect. Are they the possibilities?

A. You may find them.

Q. Answer this question a little more sensibly. In your vast railroad experience, have you ever heard of those probabilities happening to six cars, properly braked and blocked, with good, efficient brakes, upon a siding with a one per cent. grade? In all your railroad experience have you ever heard about such a probability, as you call it, happening?

A. I do not recollect of none.

Q. In all your experience you never heard of such a case?

A. No, sir; I will assume from the testimony that three at least of these cars—

Q. You cannot assume that. I am assuming they were all in good condition. If they were all in good condition then you do not think these probabilities would apply, do you?

A. In good condition and well braked, it would not. It would be too remote.

Q. What three cars were you speaking about; the ones that were in the train, the car of which was derailed?

A. I should have said four. The fact that one man braked four cars—I am looking after the man's side of the question.

Q. You wanted to testify about these three cars that were affected by this derailment on the 19th. You testified in answer to Mr. Demming's question they receive such a shock that the brakes might get in a bad condition. Don't you know, as a matter of fact, when the derailment and the uncoupling such as took place, would stop this locomotive and three loaded ash cars in a very short distance, that that is the most positive test you could get as to the efficiency of those brakes, a running test of that kind?

A. There were more cars in the train.

Q. There was an uncoupling of only three, and the locomotive went out?

A. Fourteen in the train.

Q. If the three cars coupled to the locomotive stopped, by reason of the breaking of the hose between the third car and the fourth car, and they came to an immediate stop, as you said before, is not that a very great proof that those brakes must have been in an efficient condition when they came to such a quick stop?

A. By no means.

Q. Why?

A. The brakes of the other cars in the rear of the train might have been efficient, and the brakes on the front might have been inefficient. His brake may have ruptured.

Q. If that is so, do you mean to say the brakes of those three first cars would not be affected at all?

A. I did not say so.

Q. Would there be any shock to those three front cars?

A. Yes, sir.

Q. Are not the brakes in good condition, if they bring a locomotive and three cars to an almost immediate stop, say within eight or nine feet?

A. The other cars and the locomotive may have stopped the train.

Q. How could the other cars when they were uncoupled from it?

A. They were not uncoupled immediately.

Q. If that is the fact and that is the testimony, that these three cars came to a very quick stop, and held the locomotive, too, by reason of this uncoupling and derailment, would that not show that those brakes must have been in pretty good condition?

A. Yes, sir; if the cars held the locomotive. That would mean there were no brakes on the locomotive.

Q. That would show they were in good condition, holding the locomotive?

A. That is only on condition that they did brake and did hold the train.

Q. I am assuming they did, because that is the testimony in this case?

A. The testimony, as I understand it, is not that the cars held the train. The brakes of the whole train, stopped the train.

Q. I say it is, and here it is. The testimony is that as they were coming up the main line toward the Pen Argyl branch that one of the cars derailed, I think the fourth one, and that uncoupled the eleven remaining cars from the first three and the locomotive, that the first three and the locomotive ran on ahead a little way, and that by reason of the superior brake those three rear cars had, they stopped themselves and stopped that locomotive in a very short space of time. The three first cars became uncoupled from that train and went ahead with the locomotive. Assuming that anyhow, that would show, if they came to an immediate stop going seven or eight miles an hour and holding the locomotive, that the brakes must have been in good condition?

A. Yes, sir; but there is nothing I see that the locomotive—

Q. I say assuming that?

A. That is true enough. If you had the weight it would stop the train—

Q. Here is a train going eight miles an hour. Would the weight stop that train?

A. No, sir; the locomotive is sufficient to hold the train, in good condition.

Q. You have been testifying as to cars and have used the term that these cars are in general use in the Lackawanna Railroad and of a general class. Will you tell me from your railroad experience just how many classes of gondola cars there are? Tell me the different classes of gondola cars in use on the Lackawanna Railroad in 1909?

A. I could not say. I should think they had six or seven at least.

Q. Different classes of gondola cars?

A. Yes, sir.

Q. Are the brakes equipped all in the same way on these different gondola cars?

A. No, sir.

Q. All quite differently?

A. To the ordinary person, but those who have need to have information as to brakes there is a material difference.

Q. Suppose some of these cars were eighty thousand pounds capacity, would they have the same brakes as the sixty?

A. The brake rigging in operation on the cars would be very similar. They would have a slightly greater brake power, having 70 per cent. of the light weight of the car. The load is in excess of the proportion of the light weight of the car, and therefore the liability of getting away is more serious with a heavier car than with a lighter capacity car.

Q. With the load?

A. It would stand under good conditions.

Q. Would it not stand better?

A. No, sir, it would not. The tendency is to get away more readily. The excess of load is very apt to send it down the grade.

Q. Don't you have a stronger brake on an eighty thousand pound car than a sixty?

A. Yes, sir; it is not in proportion.

Q. What is the proportion between a sixty and an eighty thousand, as to brake efficiency?

A. It averages about 70 per cent. full efficiency. That often drops down, in practice, to 20 per cent. efficiency.

Q. You think a sixty thousand pound car would not get away as easily as an eighty thousand pound car?

A. I do. The same conditions affect each car.

Q. You said temperature would probably effect

cars of this kind, and brakes of this kind. What degree of heat or cold would it be necessary to effect the wrought iron, or cast iron, of those brakes, so that they would expand or contract sufficiently to change their pressure upon the wheel, the brake shoe upon the wheel?

A. It could not be affected by the ordinary changes of temperature, but the ordinary change of temperature, even a slight one, could effect the length of the brake, tie rods underneath the rigging, and cause the chain to drop.

Q. Would you require a change of 20 degrees to do that?

A. Four or five to ten degrees easily could do that.

Q. Four or five degrees would affect the pressure?

A. Would affect it sufficiently to drop the chain. It would not affect the pressure on the brake.

Q. We are talking about the pressure on the brake.

A. If all the rigging was kept in place, 100 degrees would not affect it.

Q. In a little place like Pen Argyl did you ever hear of a change of 100 degrees?

A. No, sir.

Q. Around July, 1909, did you ever hear of a drop or rise in the temperature of 100 degrees?

A. No, sir; it does not enter into this case at all. The temperature affects the chain, the elasticity.

Q. Suppose cars were put in there in a clear day, strongly braked and blocked, will you tell me how on earth where would be any elasticity between the brake chain and the wheels, and between the wheel and the rail at the point of contact?

A. Merely by the capillary attraction that exists everywhere in nature, together with the dew and moisture.

Q. Dew and moisture?

A. Yes, sir.

Q. Tell me how that moisture can get in at the

point of contact between the brake shoe and the rim of the wheel, and between the rim of the wheel and the rail.

A. By capillary attraction.

Q. How long would it take the brake shoe to absorb moisture?

A. The surface may become wet.

Q. Would that affect the efficiency?

A. It is not the interior that is affected. It is the surface that slides and grinds.

Q. This brake shoe is tight. I want to know how this dew and moisture is going to get at the point of contact? You say by capillary attraction, and I ask you how long that is going to take?

A. If the surfaces are in contact for any great length throughout the length of the brake shoe or the rail, it would probably take days or weeks. If the contact is only by nibs and so forth on the brake shoe then it would take only hours.

Q. You are assuming something here. I say with good brake shoes and strongly braked. You say it would take weeks before the moisture would affect it. Therefore moisture is out of the case, too?

A. No, sir, it is not. There is very little surface. There is not over $\frac{7}{8}$ th of an inch surface between the wheel and the rail. That would only take a few hours to affect that.

Q. What is the distance between the brake shoe and the rim of the wheel. What is the bearing surface there, that can be affected by moisture?

A. 14 inches.

Q. How long would it take that to be affected by this moisture?

A. That is the condition I refer to that it might take weeks, if the surfaces were smooth and in perfect condition. With new brake shoes it would only take hours.

Q. There you have the nibs?

A. Yes, sir.

Q. These were not new brake shoes?

A. Not absolutely.

Q. These three brake shoes had been used on the 19th?

A. Yes, sir.

Q. It has been testified to, I think by Mr. Kern, the conductor of this train, that what is called the running test was made of these three cars that they took from South Albion siding; that this running test was made with hand brakes; that these hand brakes held these three cars to the locomotive. Would you call that a good test of efficiency?

A. Of that kind; yes, sir.

Q. Is not that the best test you can possibly get?

A. It is like the proof of the pudding. It is one instance, and that is all.

Q. Is it not your experience when you test a thing, you test it and do not go around every hour in the day for the next ten years?

A. That is true enough.

Q. An engineer is supposed to be practical?

A. They may hold. While you know they are deformed or broken they must not be of absolute reliance.

Q. When you have a running test, with your three cars which are hand braked, and bring your locomotive to a stop, don't you in your engineer's experience call that a good test?

A. I do; but if the locomotive merely moves slower with just the brakes applied, that means nothing more than simply holds the cars.

Q. You have had running test made?

A. A running test is a natural test.

Q. You say you never saw these ash cars, these cinder cars, which ran away?

A. Not to recognize them.

Q. You know nothing about their brake equipments, the ratchet and the pawl and dog, as the employees call it?

A. Not about the particular cars. I know what they average.

Q. They may have been in almost perfect condition as far as you know?

A. They may.

Q. There are cars, I suppose, that are in an inefficient condition so far as brakes are concerned?

A. Many of them, unfortunately.

Q. You have seen that in your railroad experience?

A. Yes, sir.

Q. Is the application of a hand brake as efficient as the application of an air brake on standing cars? Which do you think is the stronger?

A. The application of the air brake is harder, but for standing cars the hand brake is the only safe way.

Q. How much harder do you think the application of the air-brake is than the hand brake?

A. Not as much as 50 per cent. May be only 10.

Q. The pressure on an air brake is very quick?

A. Yes, sir. There is that much elasticity in an air brake.

Q. Take your hand brake. Do you have that elasticity you have in an air brake?

A. You do not.

Q. Is not the hand brake, properly put, more efficient than the applying of an air brake?

A. It surely is, because the air will release, and the cars will run away.

Q. How, in an engineering way, do you determine on the question of power, the difference between hand brake power and air brake power?

A. By tests, by running tests, velocity and drop tests.

Q. Does the weight of a man like Grupe, compared with a small man, make any difference in the application of the hand brake? He testified he braked these last four cars. Would that make any difference in your estimate, of braking power?

A. Braking is really an art. A man who knows how to apply the brakes can do very much better, even though a small man.

Q. A man who knows how and is a big man can do it better than a man who knows how and is a little man?

A. If he exercises his power.

By A JUROR:

Q. Why don't they use brake sticks to set the brake so much harder?

A. That has been prohibited because they often break.

By MR. CAMPBELL:

Q. Take these gondola cars of sixty thousand pounds capacity, upon this Albion siding No. 2, which you testified is a one per cent. grade. Take the brakes in good and efficient condition, and have them applied by a man who knows how, as you have testified, tell us how many of those brakes will hold those cars, what you would admit a safe number?

A. What I would admit a safe number to hold?

Q. Yes, sir; on a one per cent. grade.

A. I should follow the book of rules.

Q. What does the book of rules say about that on the Lackawanna Railroad?

A. That they must be all braked and blocked, if necessary, and every precaution taken so they don't enter into the main line.

Q. You understand what is necessary from you, to hold those cars in, loaded lightly with cinders?

A. I cannot conceive of anything that would hold those cars absolutely.

Q. Absolutely?

A. No, sir.

Q. You have testified a little while ago that if the brakes were in good condition, they would hold. Now you say you do not know anything that would hold them in absolutely?

A. For a while, yes sir according to your question.

Q. How long?

A. Until they would release.

Q. Until they released?

A. Yes, sir.

Q. When would the cars with the brakes in good condition, the four rear cars of the train of six loaded with cinders, the brakes strongly put by a man who knows how, when would those brakes release on a siding like Albion No. 2?

A. If the brakes were perfectly set they would not release at all.

Q. You said that they do not use brake sticks now, in answer to juror No. 3.

A. No; they have been prohibited, because they deform the brake rigging, parts of the brake apparatus, brake rigging.

Q. How was it in July, 1909?

A. The rule was in force before that.

Q. Do you remember the wording in that rule?

A. No, I do not recall it.

Q. Does not that apply only when cars are moving, not standing; don't you remember that?

A. No; it applies for cars standing as well. That is on account of deforming the apparatus.

Q. You are familiar with the classification yards of the Lackawanna Railroad, are you?

A. I am.

Q. Don't they use them all the time on those three and four per cent. hump grades?

A. Yes; a short stick for convenience, otherwise they have been prohibited.

Q. They use them in Scranton yard, do they not?

A. Yes; but it is not the double stick.

Q. By using a stick of this kind to get a greater leverage, you can lock your brakes on better, isn't that true?

A. Yes, sir.

Q. In your railroad experience you have been on locomotives around yards and things of that kind, have you not? Even in your college experience you have been on locomotives observing train movements, and things of that kind?

A. I have.

Q. In all that vast experience of yours can you tell whether or not you ever even saw a locomotive by reason of jarring a car, braked with hand brakes, release those brakes?

A. Yes, I have.

Q. Where?

A. I cannot remember instances. I know when I was managing a force over the entire system of the Lehigh Valley, in 1894, we had to go into every siding on the system, and we found that condition frequently, where the brakes had been applied by our men, that they were released occasionally.

Q. A jar such as that from a locomotive would be more than the concussion from one of these little slate quarries, would it not?

A. I should think so, yes.

Q. Wouldn't you know so?

A. A jar from a locomotive could be very slight.

Q. We are talking about a good ordinary jar from a big locomotive.

A. Yes.

Q. And it would be even greater than the blows you get down on the main line that you spoke about?

A. I doubt it.

Q. How many wheels are there on these gondola cars?

A. Eight.

Q. You say there is only one brake—or we will assume that—I understand from what Mr. Grupe testified—as a matter of fact, when you turn that brake handle, does not that apply the pressure uniformly upon each wheel?

A. Practically so, yes.

Q. On both trucks?

A. Yes, sir.

Q. That is what they are built for?

A. Unless there is a little air in the cylinder.

Q. The levers are made for that purpose?

A. Yes, sir.

Q. What system of leverage is used on freight cars and on passenger cars, the same, or different?

A. Different. The application of the air brake is different on a passenger car.

Q. We are talking about hand brakes.

A. And the application of the hand brake also is somewhat different; applied by a ratchet.

Q. When cars are put in on sidings the air brake has nothing at all to do with it, has it, after you leave them there?

A. It has a great deal to do with it, if the air is left in the cylinder.

Q. Suppose the air was not left there.

A. Then it has not; except with a piston that has not been used for some time, if there was some air there, it would act as a fulcrum for the wheels and release them. The piston slides in and out of the cylinder.

Q. Suppose there was no air at all in there, then there would be no such necessity, and then the air brakes would practically—the effect would be nothing, isn't that so?

A. No; the action of the brakeman on the brake wheel may still produce a pull on the piston so as to bring out the piston part way, so that it may latch or stick. In one case we pull on the hand brakes, and on the other end there would be a pull on the piston, which may stick for a while, may stay there, but ultimately release.

Q. Do you mean to say that if you use this hand brake at all it will pull the piston out of the air cylinder?

A. Yes, it would to a certain extent. There would not be much travel, but it would be there.

Q. Where is the connection?

A. It is a false motion.

Q. Where is the connection?

A. The connection is in the lever, the brake lever.

Q. Have you anything here to show that? Don't you know that the piston does not move, as a matter of fact, with the application of the hand brake?

A. I do know that it does move to some extent.

Q. Not much?

A. It is not much, but we do not need very much.

Q. You are an expert on air brakes, are you not?

A. To that extent it will release, because of that fact?

Q. Give me the effect from the application of the hand brakes on the air brake system on the cylinder and piston, in your own words on cars of sixty thousand pounds capacity, gondola cars, on the Lackawanna Railroad.

A. There are conditions under which the piston can act as a false fulcrum.

Q. Give us the effect on cars of sixty thousand pounds capacity, which you are familiar with and testifying as an expert on. Describe how it is done. You are testifying about something you know; there is no probability or possibility, but you know this occurs, so you said.

A. That is all I can say as to that; that the piston sometimes does act as a false fulcrum on the levers as operated by the hand appliance.

Q. Sometimes; it does not always?

A. No, just a trifle. It is only when there is friction, some friction of the piston, that applies.

Q. Does it not always do it?

A. Not always. There are conditions, perhaps not forty per cent. of the times when it does to a certain extent.

Q. Didn't you say that the piston rod from this air cylinder was attached to the levers, and so forth, so that when you operate the hand brakes it made the movement in the cylinder?

A. Yes, I did.

Q. Is that so?

A. That is true to a certain extent.

Q. It must be true or not true.

A. They must operate to an extent.

Q. Suppose the air brakes are on, can you use the hand brakes?

A. You can have the hand brakes tightened up to an extent.

Q. Suppose there is no air in the cylinder, can you use the hand brakes?

A. You can.

Q. Do you know this gentleman sitting by me?

A. I do well.

Q. Is he an expert?

A. He is; he is air brake inspector of the Lackawanna.

Q. Does he know more about air brakes than you do?

A. Far more.

Q. Far more?

A. Yes, about the operation, the technicalities, and so forth.

Q. About air brakes?

A. Yes. As for releasing the cars, I hold my own on that. As for releasing the cars and the effectiveness, and so forth, when cars are standing out on side tracks, I hold my own ground on that.

By MR. DEMMING:

Q. You are as much an expert on that as he is?

A. I am. In the application, when it comes to using it, I am as much an expert in my way as he is.

By MR. CAMPBELL:

Q. You testified that you never knew of cars such

as these getting away from a siding. Does that qualify you to be an expert?

A. That applied to cars on a one per cent. siding.

Q. Anything similar to this?

A. Similar; so nearly like it that I consider it is common as a condition.

Q. Take a three per cent. siding, and I ask you, in all your experience, where the brakes and blocks were used and they were in good condition, that you ever heard of one getting away. Tell me of one.

A. I cannot remember an instance.

Q. I am jumping this grade over one hundred per cent., a two and a half per cent. grade, if you want; tell me where any cars, gondola cars, of any number, one, two, three, four, five, six or a dozen, where there were brakes and blocks, everything in good condition, you ever heard of their getting away by themselves.

A. I should say no.

Q. You are a civil engineer, are you not?

A. I am.

Q. In building railroads you looked at the possibilities, did you not? And if the company has money enough you put in every single solitary equipment to make things absolutely safe; isn't that true?

A. We do, but—

Q. You are testifying about absolute safety, are you not?

A. No, not absolute safety.

Q. But as close an approach to it as it is possible to get?

A. Ordinary safety.

Q. Your testimony is based on that?

A. No, it is not; the ordinary safety that is provided under operating conditions, and for economical roads.

Q. That is possible?

A. On economical roads. I worked for the Lackawanna before they had money to spend.

Q. Take the building of any railroad that has plenty of capital. They employ civil engineers to eliminate every single solitary doubt of an accident, do they not?

A. No; they have to adapt the expense to suit the pocketbook.

Q. You have unlimited money; you have all the capital to go ahead and do everything you want to, everything you can, you try to do everything that you can?

A. We do.

Q. Suppose that I should take you along the line of the Lackawanna Railroad between Binghampton and Scranton—you are familiar with that, are you not?

A. I am.

Q. Also between Scranton and Portland?

A. Yes, sir.

Q. You are familiar with all the switches that run into the main line?

A. Yes, I think so. I know generally where they are, yes.

Q. You testified positively to Mr. Demming's question that every single solitary one of these sidings approaching the main line with a down grade was equipped with a derail device when you worked there, and is now?

A. No, I did not.

Q. Where cars stand?

A. Where cars stand on a grade from which they might run finally into the main line. It is the final track alone that needs derailing.

Q. Start from the station at Binghampton and give me a list of the sidings that you know are equipped with the derail device. Every single solitary one of them between Binghampton and Scranton. You are familiar with them; you testified positively that every one of them is so equipped. That is a fact, not a probability or possibility, and an expert's view; you are

trying to make this company guilty of not having something which is in universal use. Take Holmes siding, at Binghampton, and go all the way down. How about Holmes first?

A. Holmes siding has no grade on it, as I recollect it, anywhere.

Q. Are you sure of that?

A. I am not absolutely sure.

Q. Suppose I told you that it had a one per cent. grade.

A. I should doubt it.

Q. Suppose I told you half of one per cent.?

A. I should doubt that, unless it was at the end.

Q. You do not think it has a grade at all?

A. Not sufficient for cars to run down.

Q. Take the siding next to Holmes coming down, which is not equipped with the derail device.

A. I do not remember those tracks in detail. I think that is a passing track.

Q. Take the west end of Halstead yard; has that a derail? That certainly has a grade, has it not?

A. Halstead yard has quite a grade, and there is a long track leading out of the yard before you enter the main line track. I am not so sure whether there is a derail there, but I believe that there is.

Q. You believe that there is?

A. Yes, sir; I believe there is.

Q. You are not sure?

A. There is no necessity for having one on that track.

Q. Is it not exactly the same there as on the Pen Argyl branch?

A. No; there are ways for deflecting the cars by means of switches, turning them to one side.

Q. Do not all those switches lead right into the main line?

A. They ultimately do, yes.

Q. But if all those switches were so placed, a car could come right down on the main line?

A. If all were open, yes.

Q. Couldn't they run through, just like they ran from this siding onto the Pen Argyl branch, through that split switch?

A. Yes, they could, if there was nobody there to observe their coming.

Q. Just the same as on the Pen Argyl branch or Albion No. 2?

A. The west end of Halstead yard is manned continually; there is a force of men there by which they can observe what is taking place in the yard. That is Halstead yard.

Q. Are you sure that it has been manned in the last year or two?

A. There are times when it has not been manned, but there were no cars in the yard.

Q. Do they not store cars in there, just like in Albion No. 2?

A. Cars which can be deflected, yes.

Q. You say you are not sure whether there was a derailing device there, or are you positive that there was?

A. I am not sure that there was a derailing device there, but I would say that the conditions are not at all similar to Albion No. 2.

Q. Wasn't there a grade?

A. There is a grade.

Q. Was it not possible for cars to drift through those switches down there?

A. Possibly, if all the switches were open, against the superintendent's orders.

Q. Those that were not closed they could run through, just as they ran through here?

A. Run through perhaps three or four.

Q. Suppose the man was not there; suppose he was taking his dinner, or something like that.

A. There is an engine house and a terminal yard there.

Q. Do you know the next siding down from Halstead?

A. One that runs the other way, at the mill there. The name has been changed.

Q. You mean the grade runs down the main line?

A. Runs down into the end of the siding.

Q. I am talking about the first siding leading into the main line on a down grade.

A. The next one is New Milford, a passing track.

Q. Isn't there one opposite the Creamery there, at Summerville?

A. That is the one I refer to. That descends towards Binghampton.

Q. Is there a derail from that into the main line?

A. The switch is at the upper end of the track.

Q. Isn't there a switch into the main line at the north end of the siding?

A. At the upper end of the grade.

Q. Isn't there one at the lower end?

A. There is not.

Q. Is there any derail there?

A. No necessity for a derail. The cars would run into the ground off of the end of the track. There is no necessity for a derail there. The cars would run in the opposite direction from the main line.

Q. Would they not run towards the direction of the main line tracks?

A. They would not.

Q. Would they not run towards Binghampton?

A. Towards Binghampton. The switch is at the Scranton end.

Q. Has it a stub end or not, looking west?

A. Stub end.

Q. This was when, 1901?

A. That was as recent as 1909. I was up there then.

Q. You were talking about New Milford a moment ago. Do you remember the siding at the coal chutes?

A. It runs—leads off from the upper side—runs I should say—leaves the main line track from the east, and the grade for a considerable distance descends towards Binghampton, which is the end of the track. There is a grade leading up to the coal chutes, and then there is a level place above on that, more nearly level, on which cars have been blocked during my time. The coal trestle is still there, or was there last Winter; but the grade is not sufficient to run the cars off of the coal chutes completely up to the main line.

Q. But if the cars got away from there for any reason, would they not run right down to the main line on account of that drop?

A. No, the drop is not sufficient to take them up there.

Q. What sort of a drop is it?

A. I am not sure there it not a derail. The drop is very steep for a short distance. It is not much.

Q. You are not sure whether there is a derail there?

A. I am not sure. As I recollect, there is one there.

Q. What about the two passing sidings at Alford? Do you remember those?

A. Yes.

Q. How about derails there?

A. There are none. They are exclusively passing tracks. There is a track there that is used for a station track on which cars are seldom placed, except for unloading, and a track back of it, which also descends—that runs into the branch that leads to Montrose.

Q. There is a grade?

A. There is a grade, but that runs towards Montrose.

Q. Is there a derailing device there?

A. No necessity for any, under those conditions.

Q. Is it not a direct run to Montrose? Could not cars go down just like on the Pen Argyl branch?

A. Yes, but the switches are thrown so as to de-rail cars across the creek.

Q. Are not the switches just the same?

A. It is connected so as to run back of the station at Alford.

Q. These cars, you testified, will run right through the point switches?

A. No, they open the other way. They would run toward the base. Runaway cars would run toward the base, be deflected from the main line.

Q. There is a main line running down to Montrose?

A. Up to Montrose.

Q. Do you not term it a main line, the same as the line of the Lackawanna from New York to Buffalo?

A. No, it is a main track.

Q. What do you call the railroad from Alford to Montrose?

A. It is a main track.

Q. Don't these cars go into that?

A. No, they could not run into that.

Q. Suppose there is a passenger train for Montrose at the Alford station; and suppose these cars got away from that siding, would they not run right into that?

A. The train at the station platform?

Q. At the station platform; would not the cars run right through?

A. The runaway cars coming from Montrose?

Q. Yes; from the siding.

A. No; because they would pass one another. The Alford station track is back of the station, whereas the siding is in front of it.

Q. Is there a siding in front of the station?

A. Not in front of the building; down below where the passing track leads out.

Q. If cars got away from this siding, and there is a Montrose train standing at Alford station, the train

that runs between Montrose and Alford, would not that be hit by the runaway cars?

A. No; because at the rear of this station a car will not run between the main line switch and Montrose Junction.

Q. When you were working as civil engineer, did you advise them or tell them not to put in the derail switch?

A. I surely would.

Q. You would not have done that?

A. I would not have put in the derailing device.

Q. You would not?

A. I would not. There is no necessity for one there.

Q. Do you know where the bridge is over the creek near the station?

A. I do.

Q. Is there not a branch running west of that where the cars are stored, milk cars, and so forth?

A. There is a track there that leads to the coal chutes, on which they place cars, which descend to the coal chutes from this Montrose branch.

Q. There is no grade to the main line?

A. There is a track there that leads to the coal chutes and goes away from the main track.

Q. Is there not another siding across the way?

A. That is east of the—on the main line side.

Q. I am going to ask you if every siding approaching the main line, upon which cars were stored, between Binghampton and Portland, were equipped with the derailing device?

A. Not nearly every track, no.

Q. Not nearly every track was so equipped?

A. No.

Q. Then derails were not in universal use at that time?

A. They were for tracks which were on a grade descending from a storage track toward the main line track.

Q. When you put in derails do you put them all in at the same time?

A. No; but when you construct a track, put a derail in, in the very first instance.

Q. You said that when you were at college you went to see the Bangor & Portland Railroad.

A. No, I was on the Lehigh Valley.

Q. Were there any derails on it then?

A. Very few; mostly stub switches, which themselves are derails.

Q. The road was not a very paying proposition, was it?

A. I do not know how it paid. It did not look as though it paid.

Q. The Lackawanna did not consolidate with it until 1908, you know that as a matter of railroad history, do you not?

A. They had an arrangement whereby they operated that Bangor & Portland Railroad.

Q. They had no control over putting any derails in until 1908, the date of the consolidation, did they?

A. I do not just know. I do not know when that consolidation took place.

Q. You testified positively about that question, that the Lackawanna practically owned that road since 1901, didn't you?

A. That was the assumption.

Q. If I told you that the consolidation did not take effect until 1908, would you say that was correct?

A. That would be a paper title. You know how those things are.

Q. When was the Lackawanna able to put a derail on that road, in 1908 or 1901? When would they have the right to change the construction of the right-of-way; only when consolidated, would it not?

A. It would depend altogether upon their contract.

Q. You know nothing about that contract, do you?

A. No; except—

Q. You did testify that they owned it in 1901, didn't you?

A. That was all our understanding, the common understanding that they really owned it. They were operating it as the Bangor & Portland Railway.

By MR. DEMMING:

Q. In 1901?

A. Yes, sir.

By MR. CAMPBELL:

Q. Don't you know that the Bangor & Portland used the Lackawanna equipment for several years; that the Lackawanna did not have anything at all to do with it, that all suits were against the Bangor & Portland Railway, and that that was a matter of common knowledge, was it not, up there?

A. Yes, I know that; the same as the Easton & Amboy Railroad is independent of the Lehigh Valley.

Re-direct-examination.

By MR. DEMMING:

Q. You were asked this question by the gentleman on the other side: If the brakes were perfectly applied to the cars on this siding, Albion No. 2, from which they ran away, would they stay there? The answer you had to give, of course, was yes. Can you tell, can any one tell, if the brakes were perfectly applied, simply by putting them on hard, just as hard as has been described here?

MR. CAMPBELL: That is objected to as not re-examination; it is objected to as a hypothetical question assuming certain facts.

THE COURT: That has all been gone over.

MR. DEMMING: On cross-examination counsel for the defense brought that out. I have a right to re-examine into that.

THE COURT: You have gone over that.

MR. DEMMING: I am asking him whether any one can tell, as this brakeman has said he simply put the brakes on hard.

THE COURT: You have gone over that. He said no.

MR. DEMMING: If that is absolutely understood, I am satisfied.

THE COURT: Whether it is absolutely understood or not, we have it in evidence. It is for the jury to remember. We will not go on and rebut things so often.

MR. DEMMING: I offer in evidence the two photographs of derailing devices which have been identified by Mr. Riegel; and the drawings of the brake apparatus.

MR. CAMPBELL: I object to the admission in evidence of the drawings of the brake apparatus as not proper under the circumstances.

THE COURT: We will admit the photographs and the drawings.

(Exception for defendant noted by direction of the Court.)

MR. DEMMING: I also offer in evidence the certificate of the appointment of Lizzie M. Troxell as administratrix, by the Register of Wills of Northampton County, Pennsylvania.

THE COURT: It is admitted.

MR. DEMMING: I also offer in evidence the sketch which has been identified of the locality, showing the location of the quarries and the different tracks, not as a sketch drawn to a scale, but as showing the general situation.

THE COURT: It is admitted.

MR. DEMMING: I do not know whether this

little plan or model of the tracks is admissible or not, which is produced simply by way of illustration to help explain the case to the jury.

MR. CAMPBELL: This is a little toy that Mr. Demming bought on the street. I object to it.

(Offer of toy track withdrawn by counsel for plaintiff.)

MR. DEMMING: I also offer in evidence the plan and profile of the Albion siding No. 2, and of a part of Pen Argyl branch, made by Mr. Weeks, showing the grade on this siding.

It is agreed between counsel, and it is conceded without any formal proof, that the Delaware, Lackawanna & Western Railroad Company manages, operates and controls the Bangor & Portland Railway Company upon which this accident occurred, and did so manage, operate and control it at the time of the accident, on July 21, 1909, as one of the divisions of the main line and system and also that the Delaware, Lackawanna & Western Railroad Company itself is an interstate railroad running and operating its line and system in the States of New York, Pennsylvania and New Jersey.

PLAINTIFF RESTS.

Counsel for defendant moves for a non-suit, upon the grounds:

First, that the case is not properly on the trial list;

Second, that it is *res adjudicata*;

Third, that the action, being concurrent, that is, the right of the widow to bring an action under the laws of the State of Pennsylvania, and the

Motion for Non-Suit.

right of the personal representative under the Federal Employers' Liability Act, that having once brought an action concurrently in the State Courts, she is barred from this action;

Fourth, that the Employers' Liability Act is unconstitutional; and

Fifth, that this action cannot proceed until the costs in the previous concurrent action have been paid, the record showing that they have not been paid.

Argument on motion for non-suit.

Recess until 2 p. m.

2 p. m.

Argument on motion for non-suit.

Adjourned until Wednesday, November 15, 1911, at 10 a. m.

Before HON. JAMES B. HOLLAND and a Jury.

Philadelphia, Pa., November 15th, 1911.
10 a. m.

Present:

GEORGE DEMMING, Esq., for Plaintiff.

JAMES F. CAMPBELL, Esq., and

L. A. OLIVER, Esq., for Defendant.

THE COURT: I have gone over this matter, and without expressing any opinion, or without

making any extended remarks, or giving any extended reasons for it, I have concluded to refuse the motion for a non-suit and plea of *res judicata*, because while it is a fact that on the statement I find it was *res judicata*, because from reading the statement it appears that they relied entirely upon the negligence on the part of the defendant to put in a switch. If that was the only fact here, upon which the responsibility of the defendant was to be predicated, it would be *res judicata* because that question of negligence was adjudicated in the other case, although they are different causes of action, as I then held. But now there is another fact here, which I think ought to go to the jury, and that is whether it was not the negligence of co-employees of the dead man that caused his death, in the manner of putting these cars in. That was a ground of responsibility that did not exist in the former suit, that exists now, and was not adjudicated. Therefore the plea of *res judicata* I shall hold does not bar submitting this to the jury.

MR. CAMPBELL: To get the record in shape I should prefer you to refuse the non-suit, then I will start by offering the evidence in the former trial.

MR. CAMPBELL: At the close of the plaintiff's evidence yesterday, Mr. Demming apparently was reading from a stipulation he had made, agreeing to certain facts. I said to him that is not signed. He said that does not make any difference. I said of course I will let it go in anyhow. Upon reading this morning, the admission, I find it is not a copy of this stipulation at all. Therefore I think his statement should be replaced by the stipulation of counsel.

MR. DEMMING: No stipulation of counsel has been made.

MR. CAMPBELL: Then I withdraw the admission and ask for proof.

THE COURT: I do not understand that.

MR. CAMPBELL: On looking upon the record this morning I find he did not put that stipulation in at all, but something else, some other admission.

MR. DEMMING: Tell His Honor what it is.

MR. CAMPBELL: The statement he made yesterday is: It is agreed between counsel, and it is conceded without any formal proof, that the Delaware, Lackawanna and Western Railroad Company manages, operates and controls the Bangor & Portland Railway Company upon which this accident occurred, and did so manage, operate and control it at the time of the accident, on July 21, 1909, as one of the divisions of the main line and system and also that the Delaware, Lackawanna & Western Railroad Company itself is an interstate railroad, running and operating its line and system in the States of New York, Pennsylvania and New Jersey.

My stipulation was that the defendant, Delaware, Lackawanna & Western Railroad Company maintains, operates and controls the Bangor & Portland Railway Company upon which this accident occurred, as one of its divisions of its main line and system, and that the Delaware, Lackawanna & Western Railroad Company is a common carrier by railroad, engaged in the business of interstate and intra-state traffic between and in the States of New York, Pennsylvania and New Jersey.

THE COURT: That is not in? Why did not you put in what he agreed to?

MR. DEMMING: Nothing was agreed to. I

called at the office of Mr. Campbell and asked him, and presented a stipulation.

THE COURT: Strike it all off. You said you were reading a stipulation.

MR. DEMMING: I said I was putting on the record what was conceded by counsel.

THE COURT: And agreed to.

MR. DEMMING: Nothing was agreed to. Nothing was signed. I am willing to have Mr. Campbell amend it in any way he thinks is proper. There was no stipulation.

THE COURT: Strike it off, and if you can get together, all right. If you cannot, you will have to prove it.

MR. CAMPBELL: You have dismissed the motion for a non-suit.

MR. DEMMING: Before we pass this point—we have to cover this part of the record, because the plaintiff's case has been closed.

MR. CAMPBELL: I refuse to let the stipulation go in, and will not agree to the facts. Now prove it.

MR. DEMMING: Mr. Campbell agreed with me that he would concede at this trial, without formal proof on the part of the plaintiff, that the Delaware, Lackawanna & Western Railroad Company and the Bangor & Portland Railroad Company, which it controls and operates, and did at the time of this accident, is engaged in interstate commerce. That was the concession. We all know that is a fact.

MR. CAMPBELL: It was not.

THE COURT: Go on and prove it if you can.

That is all stricken out. You ought to do this in the proper way. You may have done it thoughtlessly, but you left me and left everybody else under the impression you were putting in a written stipulation of both sides. Now it turns out it was no such a thing. You have yourself in this position now. Go on and prove it.

MR. DEMMING: Which will you agree to?

MR. CAMPBELL: I do not agree to anything now. Go ahead and prove it.

MR. DEMMING: There is no difference whatever between the copy which Mr. Campbell has and the copy which I have, except the word "Intra-state". I am willing to have that go in.

MR. CAMPBELL: All right. I will let it go in as follows:

STIPULATION BETWEEN COUNSEL.

It is hereby expressly stipulated, understood and agreed between counsel for the respective parties in the above cause, that at the trial of the case, set for Monday, November 13, 1911, in the United States Circuit Court, Philadelphia, it shall be conceded without formal proof thereof and so placed upon the record, that the defendant, Delaware, Lackawanna and Western Railroad Company, maintains, operates and controls the Bangor & Portland Railroad Company, upon which this accident occurred, as one of the divisions of its main line and system, and that the Delaware, Lackawanna and Western Railroad Company is a common carrier by railroad, engaged in the business of inter-state and intra-state traffic between and in the States of New York, Pennsylvania and New Jersey.

DEFENDANT'S EVIDENCE.

MR. CAMPBELL: I offer in evidence the record of the case of Lizzie M. Troxell vs. The Delaware, Lackawanna & Western Railroad Company, in this Court as of April Sessions, 1909, No. 694, which shows that this action is similar to the one brought, according to that record.

MR. DEMMING: That record is objected to on the ground that it is immaterial, irrelevant and incompetent for two reasons; first, that an inspection of the record will show that the parties in that action were entirely different parties from the parties in the present action. Second, because an inspection of that record will show that the cause of action in that action was entirely different from the cause of action in the present suit.

THE COURT: As the Court views it the evidence is admitted. The objection of the plaintiff is overruled.

(Exception noted for plaintiff by direction of the Court.)

W. B. BUNNELL, having been duly sworn, was examined as follows:

By MR. CAMPBELL:

Q. Where do you live?

A. Scranton, Pennsylvania.

Q. What is your position?

A. Photographer.

Q. For whom?

A. The Delaware, Lackawanna & Western Railroad Company.

Q. Did you take certain views of the siding at the Pen Argyl branch?

A. I did.

Q. From which these loaded ash cars got away?

A. I did.

Q. Do you remember when that was?

A. I think it was February, 1910.

Q. Have you your copies of those pictures with you?

A. I have.

Q. Will you explain to the Court and jury just what those pictures are, and mark them with letters or in some way?

By MR. DEMMING:

Q. Is there anything marked on the backs of them?

A. No, sir, there is an index to the number, that shows the location, on the front of it.

Q. Were they all taken at the same time?

A. Yes, sir.

Q. What time of day?

A. Around noon; I do not remember just the exact time.

By MR. CAMPBELL:

Q. On February 18, 1910?

A. Yes, sir.

Q. Take this picture marked "593 C", and explain what it is.

A. 593 C was taken below the branch, that is the Pen Argyl branch from the main line looking toward—

By THE COURT:

Q. The Pen Argyl branch runs off to the left?

A. Yes, sir, to the left.

By MR. CAMPBELL:

Q. Take 594 C and explain what that is.

MR. DEMMING: You better have the pictures

marked on the back. The plaintiff does not object to these pictures, but they ought to be marked so we understand them.

THE COURT: They are marked.

THE WITNESS: 594 C, is taken—there is a man shown in 593.

By THE COURT:

Q. 594 C, what is that?

A. That is taken a little further up, showing the wagon crossing. 593 shows a man in the distance. 594 is taken from the position near where the man stands in 593 looking toward—

By MR. CAMPBELL:

Q. 593 shows the Pen Argyl branch going off?

A. Yes, sir.

Q. 594 is up at the Pen Argyl branch?

A. Yes, sir.

Q. In which picture is shown a man, and your camera is placed where the man is in the next picture. Is that right?

A. Yes, sir. 595 is taken from the crossing shown in 594, that shows the man standing in the distance, and the Albion No. 2 siding in the distance.

By THE COURT:

Q. That is in going up you stand a man that distance, and from where he stood took the next picture?

A. Yes, sir. 596 is taken at the switch points, showing the Albion No. 2 siding leading off to the right and Pen Argyl to the left. 597 is taken from where the man is shown in 596, showing a section of the track that the—

By MR. DEMMING:

Q. Which track?

A. Of the Albion No. 2 siding. These are all of the siding. 598 was taken on up the siding, the same as the others. No. 600 C is a side view of the siding,

giving an idea of the lay-out. No. 601 C is a view taken between the tracks showing the opposite direction.

By MR. DEMMING:

Q. Taken from where?

A. Between the tracks.

Q. Between the siding and the Pen Argyl branch?

A. Yes, sir.

Q. Looking toward the Pen Argyl junction?

A. Yes, sir. 602 C is taken from below the Albion No. 2 switch points showing the switch with the cars standing in about the same position that——

Q. You do not know about that. With cars standing there.

A. With cars standing on the siding. 603 is taken from the Pen Argyl branch looking in the opposite direction from 602. 604 C is taken further up on the Pen Argyl branch showing a string of cars on the siding.

(No cross-examination.)

QUINTUS RUCH, having been duly sworn, was examined as follows:

By MR. CAMPBELL:

Q. Where do you live?

A. Bangor, Pennsylvania.

Q. What is your business?

A. Conductor.

Q. For whom?

A. Delaware, Lackawanna & Western Railroad Company.

Q. How long have you been railroading?

A. About 12 years.

Q. All the time for the Lackawanna?

A. Yes, sir.

Q. In order to save time, were you the conductor of this Pen Argyl switch engine?

A. Yes, sir.

Q. Do you remember some ash cars that were put on Albion No. 2 siding on July 19, 1909?

A. Yes, sir.

Q. Will you go on in your own way and tell exactly what you know about those cars, from the time you first saw them until you saw them running away?

A. On the 20th, about 8 a. m. we handled those cars. We had two empty box cars to put on the rear end of the switch for slate. Those six cars of ashes stood on the head end. In order to get those two empty cars on the rear end we had to set those six cars of ashes on the Pen Argyl branch.

Q. In order to put those two box cars upon the rear end, you had to take these cars out?

A. Yes, sir.

Q. In taking them out what did you have to do?

A. Had to put on the brakes to haul them to the main line of the Pen Argyl branch.

Q. Did you find any brakes upon the cars when you first saw them on the Albion No. 2?

MR. DEMMING: Objected to as leading.

By MR. CAMPBELL:

Q. How did you find the brakes on those cars when you first found them on Albion No. 2?

A. We found five brakes on.

Q. Did you release those brakes or did you not, in order to get the cars out?

A. We tried to pull them out and had to release them to get them out.

Q. You tried to get them out with what?

A. With the engine.

Q. You could not pull them?

A. Could not pull them out, and had to release the brakes. The intention was to pull these cars out with the brakes on to help hold them after we got out of the switch.

Q. Then you got them out of this siding on to

the Pen Argyl branch, and you say you did what then, in order to hold them?

A. We set three brakes on them.

Q. Set three brakes?

A. Yes, sir.

Q. Did that hold them?

A. That held them, yes, sir.

Q. What is the grade of the Pen Argyl branch where you placed these cars, compared with the grade on Albion No. 2?

A. The grade is heavier on the branch than it is on Albion No. 2.

Q. In putting these cars back, after you had placed the box cars in the quarry, describe then what you did.

A. We set them back and we put five brakes on and three blocks under.

Q. Did you personally do anything?

A. I and a fellow named Ackerman, we double set the car next to the engine with the brakes; and Grupe, the other brakeman he set the other front brakes. I put two blocks under them. Ackerman, he says he put one under.

MR. DEMMING: I move to have that stricken off.

MR. CAMPBELL: Strike that out.

By MR. CAMPBELL:

Q. Did you see Mr. Ackerman put any blocks under?

A. No, sir.

Q. Did you see any other block under any wheel there other than you put in there at that time?

A. How is that?

Q. Did you see any block put in by anybody else? You put in two?

A. No, sir, I did not see anybody else.

Q. Did you make an examination of the brakes that day as conductor of that crew?

A. How is that?

Q. Did you make any examination of the brakes on these cars?

A. No more than setting them and the fact three brakes held them on the Pen Argyl branch.

Q. Did you make any other test there?

A. No, sir.

Q. Did you look at the brake shoes?

A. No, sir.

Q. Did you look at the brake staff?

A. The staff was all right.

Q. How was the dog or the pawl?

A. That was all right.

Q. Three brakes held all these cars?

A. Three brakes held them out on the Pen Argyl branch.

Q. Do you know how long those cars had been in Albion No. 2, before you disturbed them?

A. No, sir, I do not know. I cannot tell that.

Q. How long have you been working in the neighborhood of Pen Argyl?

A. About four years.

Q. Did you ever know of any other cars to be stored there?

A. Yes, sir.

Q. As many as six?

A. Yes, sir, as many as eighteen.

By MR. DEMMING:

Q. Where?

A. On Albion No. 2.

By MR. CAMPBELL:

Q. I mean on Albion No. 2?

A. Yes, sir.

Q. As many as eighteen cars you have known to be stored on Albion No. 2 siding?

A. Yes, sir, at one time.

Q. Did you ever hear in all of your experience, of any cars getting away from Albion No. 2?

A. No, sir.

Q. How were these other cars held in there?

A. The eighteen by hand brakes.

Q. How many hand brakes to your own knowledge on those eighteen cars?

A. We used to put on four or five.

Q. Four of five would hold the eighteen cars?

A. Yes, sir, would hold eighteen.

Cross-examination.

By MR. DEMMING:

Q. You heard of these cars getting away, did you not?

A. Yes, sir.

Q. You did hear of cars getting away from Albion siding No. 2?

A. These six, yes, sir.

Q. Your locomotive and your crew had nothing to do with these cars at the time they got away?

A. No, sir, we placed the cars in before that.

By THE COURT:

Q. What time in the day was it you were in there?

A. About eight o'clock in the morning we handled these cars.

By MR. DEMMING:

Q. In the morning?

A. Yes, sir.

Q. You are conductor of what crew?

A. What is called the drill crew, Pen Argyl drill crew.

Q. That drill crew operates where?

A. Bangor and Pen Argyl to Wind Gap.

Q. Between those two points?

A. Yes, sir.

Q. What are your duties there, what do you do there?

A. Conductor.

Q. What does your crew do?

A. I do not quite understand that question.

Q. They drill the cars in the yards?

A. Yes, sir.

Q. By drilling cars you mean you take the cars out of the trains?

A. Out of the trains and drill them around; place empty cars, and gather up loaded ones.

Q. Do you make up trains too?

A. No, sir.

Q. Simply take the cars out of trains and place them?

A. We do not take any out of the trains. We just get the loaded cars out and we place empty cars. Place loaded cars that come in.

Q. The loaded cars that are dropped off by the different trains that pass there?

A. Yes, sir.

Q. Your crew picks up and puts them on the different sidings for these quarries?

A. Yes, sir.

Q. Then you take the other cars out and put them where the regular trains can get them?

A. Yes, sir.

Q. You say you took the cars out this siding and stood them on the Pen 'Argyl branch?

A. Yes, sir.

Q. And they stood there?

A. Yes, sir.

Q. How long did they stand there?

A. Probably about ten minutes or fifteen.

Q. That was all?

A. Yes, sir.

Q. A very short time?

A. Yes, sir.

Q. Then you put them back again on this Albion

No. 2?

A. Yes, sir, on Albion 2.

Q. You heard the testimony of Mr. Grupe, did you not, on Monday?

A. Yes, sir.

Q. You put them back, did you not, according to Mr. Grupe, 175 or 180 feet beyond the point of the switch?

MR. CAMPBELL: Objected to as not cross-examination.

THE COURT: What is the objection to that?

By MR. DEMMING:

Q. Is that true?

A. Yes, sir.

Q. That is on the steeper part of the grade of Albion No. 2 is it not?

A. No, sir, the grade is about the same thing in there.

Q. Is it not level for the first hundred or one hundred and fifty feet?

A. I do not think so, no, sir.

Q. You do not think so?

A. Not to my eye.

Q. You judge by your eye the grade of the Pen Argyl branch too?

A. In riding cars.

Q. Judge by your eye?

A. Yes, sir, from experience in riding cars.

Q. You are judging by your experience of the grade of Albion siding No. 2?

A. In regard to riding cars, riding cars on Pen Argyl branch and Albion No. 2.

Q. You would be surprised to know that the first 100 or 150 feet of Albion siding No. 2 is practically level?

A. I probably would be.

Q. You have been working how long for the Delaware, Lackawanna and Western?

A. I worked under the old B. & P. I have been working under the Delaware & Lackawanna ever since it has been operated as the Bangor & Portland.

Q. How many brakes on these six cars did you put on?

A. I helped put one on.

Q. What is that?

A. I helped put one on.

Q. You helped to put one on?

A. Yes, sir.

Q. Which car was that?

A. The car next to the engine.

Q. That would be the first car toward the end or toward the switch of the siding?

A. Toward the switch.

Q. Toward where it joins the Pen Argyl branch?

A. Yes, sir.

Q. Who was the other man who helped?

A. Ackerman.

Q. Is he in court?

A. No, sir.

Q. Those cars had brakes only on one end?

A. On one end. That one brake staff operated the both trucks.

Q. On all the trucks?

A. Yes, sir.

Q. You made no other examination of the brakes on these cars other than putting on that brake?

A. That was all.

Q. Who put the brake on the car next to that, if you know?

A. Grupe, he is the man put the other four brakes on.

Q. You had six cars, had you not?

A. Yes, sir. One of those brakes was not put on.

Q. Which one of the cars?

A. I do not know which one it was.

Q. You do not know which one?

A. No, sir.

Q. You do not know which cars Grupe put the brakes on?

A. The four rear cars.

Q. Do you know that? Did you see that?

A. I saw him go back over them, yes, sir.

Q. You saw him go back that way?

A. Yes, sir, I saw him wind up the brakes.

Q. You saw him go back that way?

A. Yes, sir, and twist up the brakes.

Q. Did you see him put on the brakes yourself?

A. I saw him twist on the brakes, yes, sir.

Q. On all of these four cars, did you see that?

A. Yes, sir, I did.

Q. What did you mean a while ago when you said you did not know which car it was that did not have the brakes on? Did not you say that?

A. I did, yes, sir. I misquoted myself.

Q. Which car was it?

A. It certainly must have been the second to the engine.

Q. You think it must have been the second?

A. Yes, sir.

Q. How many blocks did you say you put under the car?

A. I put on two blocks.

Q. You are positive of that?

A. I am positive of that, yes, sir.

Q. Which wheels did you put blocks under?

A. On the front truck of the head car, and the second car.

Q. And the second one?

A. Yes, sir.

Q. You went back to the second car, did you?

A. Yes, sir, I did.

Q. Why did not you put the brake on on that car?

A. I climbed up to the tank and walked back and put a block on the second car.

Q. Why did not you put the brake on?

A. Because I did not want to.

Q. Was that brake in good condition?

A. I do not know. I did not have hold of it.

Q. Was there any particular reason why you did not want to?

A. No particular reason, only I did not feel like climbing up. That was all.

Q. You did not get down and look at the brake staff, or the pawls or the ratchet wheels?

A. No, sir.

Q. Or the shoes?

A. No, sir, I looked at the ratchet wheels as I put it on.

Q. By standing up and turning the wheel you looked at it?

A. Yes, sir.

Q. You did not see whether the ratchet wheel was cracked or warped?

A. I do not know whether it was cracked or not, but it held when I put the brake on.

Q. At the time you put the brake on?

A. Yes, sir.

Q. Were there any nails driven in alongside of the brake staff to hold that in?

A. No, sir.

Q. Railroad men sometimes do that?

A. I do not know whether railroad men do it. I have seen nails in them sometimes.

Q. How is that?

A. I have seen nails in them sometimes. There was not any in this one.

Q. You do not know about the others?

A. I do not know anything about the others, no, sir.

Q. There was no derailing device on that siding, was there?

A. Not at that time, no, sir.

Q. Not at that time?

A. No, sir.

Q. Were there derailing devices on any of the sidings near there, of the same nature?

MR. CAMPBELL: That is not cross-examination.

THE COURT: He was not asked anything about that. Cross-examine him on what he was examined on in chief.

By MR. DEMMING:

Q. Then you left these cars in that position, and that was the last you saw of them until you heard they had ran out?

A. No, sir, I saw them during the day. We switched around there. We had been up there several times.

Q. You had been switching around there?

A. Yes, sir.

Q. But not on that siding?

A. No, sir.

Q. You did not see these cars or go near them after that?

A. No, sir.

De-direct-examination.

By MR. CAMPBELL:

Q. Why did not you brake this second car?

(Objected to.)

Q. Was it because——

(Objected to.)

Q. Was it or not because you——

(Objected to.)

Q. Was it or not because you considered that the five brakes would hold the cars?

(Objected to.)

By THE COURT:

Q. What was your reason?

A. Five brakes were sufficient to hold six cars in there.

By MR. CAMPBELL:

Q. You say these cars afterwards got away, in answer to a question from my friend?

A. Yes, sir.

Q. Do you know how they got away; for what reason?

A. I do not know.

By MR. DEMMING:

Q. What is that?

A. I do not know.

By MR. CAMPBELL:

Q. Can you tell us whether they could get away with five wheels braked such as they were with three blocks under them?

(Objected to.)

THE COURT: That is an improper question. They did get away.

MR. CAMPBELL: I am going to ask him if he knows why they got away.

THE COURT: He answered that.

MR. CAMPBELL: I want to ask him about the brakes and blocks.

THE COURT: Ask him the question and we will see what we are arguing about.

By MR. CAMPBELL:

Q. Could those cars have got away from that siding, the way you and the rear brakeman had braked them?

(Objected to.)

(Objection sustained.)

(Exception noted for defendant by direction of the Court.)

Q. What reason can you assign for these cars getting away?

(Objected to.)

(Objection sustained.)

(Exception noted for defendant by direction of the Court.)

MR. CAMPBELL: He is the only man that knows anything about it. He saw these cars. He has testified to facts, not possibilities. This is the man that put these brakes on.

THE COURT: As long as he has testified to facts he can, but your question was what reason can you assign. Does he know how they came to get away?

MR. CAMPBELL: I am going into that.

THE COURT: He cannot go into speculation any more than anybody else.

By MR. CAMPBELL:

Q. If these cars were in the same condition as to brakes and blocks at the time they went out, I mean as you had left them, could they have gone out?

(Objected to.)

(Objection sustained.)

(Exception noted for defendant by direction of the Court.)

THE COURT: Read that question.

(Question read to Court.)

MR. DEMMING: I object to that.

THE COURT: What is the objection?

MR. DEMMING: In the first place it is an improper question.

THE COURT: Strike that ruling out.

MR. DEMMING: Suggesting an answer. It is a leading question. In the second place this man is not qualified as an expert to answer a question of that sort.

THE COURT: I ruled out the question. Could these cars have gotten away from there, having been blocked and braked as you blocked them and braked them? I think that was improper for this reason. He braked and blocked them that way at eight o'clock the day before. He knows nothing of the subsequent conditions, what occurred and so on. But the question now is, if these brakes and these blocks were the same when they ran out, as they were when he put them on, could they have gotten away. That is a different proposition, because that is asking him whether or not the brakes and blocks he put on there at that time, if they continued, could they get away. You say he is not an expert, to answer that. That I do not think requires an expert. It requires only those men who are doing that work, fairly competent men. When they put cars in on a siding they, from their experience know how much it would take to hold them and evidently do hold them.

MR. DEMMING: At that particular time.

THE COURT: The objection is overruled.

(Exception noted for plaintiff by direction of the Court.)

By MR. CAMPBELL:

Q. If those cars were in the same condition as to brakes and blocks at the time they went out, I mean as you had left them, could they have gone out?

A. No, sir, they would not. They would never have gotten away.

Q. Why could they not have gone out?

MR. DEMMING: Objected to for the same reason.

(Objection overruled.)

(Exception noted for plaintiff by direction of the Court.)

By MR. CAMPBELL:

Q. Why could they not have gone out?

A. There was brakes and blocks sufficient to hold those cars.

Q. Did you ever hear of cars braked and blocked in the manner such as you braked those cars, going out from any siding of even a greater grade than Albion No. 2?

(Objected to.)

A. No, sir.

(Objection overruled.)

THE WITNESS: No, sir, they would not have gotten away.

By MR. CAMPBELL:

Q. They could not have gotten away?

A. No, sir.

Q. Did you ever hear of cars drifting away from Albion No. 2?

A. No, sir.

Q. You say you have known of cars of a great number being stored there?

A. Yes, sir.

Re-cross-examination.

By MR. DEMMING:

Q. You say if these cars were blocked and braked at the time they went away, as you left them, you do not see how they could get away?

A. They would not get away with the brakes and the blocks under.

Q. As you left them?

A. Yes, sir.

Q. Of course you do not know what changes may have taken place in the brakes during those twenty-three or twenty-four hours time?

A. Somebody must have been tampering with them.

THE COURT: That is not what he asked.

MR. DEMMING: Strike that out.

By THE COURT:

Q. Do you know what changes may have taken place in the brakes?

A. No, sir, I do not.

By MR. DEMMING:

Q. You do not pretend to be an expert on brakes, do you?

A. No expert, no, sir. I know how to put them on. I know when they are holding.

Q. At the time you put them on you know whether they will hold the car or not?

A. I can tell.

Q. At that particular time?

A. Yes, sir.

Q. You say you never heard of cars getting away placed on other sidings. Is that what you said?

A. Yes, sir, I said that.

Q. Do you know of any six cars placed in a similar position as these six cars at any time up there?

A. No, sir.

Q. You do not?

A. No, sir.

Q. You remember testifying before in this case do you not?

A. Yes, sir.

Q. What did you say about blocks at that other trial? Do you say now, as I understand it, you put two blocks under the front car?

A. Under the front truck of the head car and the second car.

Q. I am asking you what you did yourself?

A. That is what I did myself.

Q. Where did you put the blocks?

A. Under the front truck of the head car and the second car.

Q. One block under the front trucks of the first car?

A. And a block under the front truck of the second one.

Q. You do not mean by that two blocks under the front part of the first one?

A. No, sir.

Q. How did you put these blocks in; just throw them under the wheels?

A. No, sir, I kicked them under with my foot.

Q. Did not you say before: "Q. You just picked up some wood and threw it under the wheels? Is that it?" A. Yes, sir."

MR. CAMPBELL: Read the whole thing.

By MR. DREMMING:

Q. Is not that what you said before?

A. I do not remember.

Q. Is not that the truth?

A. It certainly must be, yes, sir.

Q. You just threw a block of wood under the wheels and walked away. Is not that so?

A. I did not just walk away at that time, no, sir.

Q. After throwing the block under the wheel of the second car you walked off?

A. We went about our work.

WILLIAM H. GRUPE, recalled.

Direct-examination.

By MR. CAMPBELL:

Q. Where do you live?

A. Flicksville, Pennsylvania.

Q. What is your business?

A. Trainman.

Q. What was it in July, 1909?

A. Trainman.

Q. For whom?

A. D. L. & W. Railroad.

Q. How long have you been railroading?

A. About twelve years.

Q. Always in that neighborhood?

A. Yes, sir.

Q. On the B. & P. Division of the Lackawanna?

A. Yes, sir.

Q. You were on the crew of the Pen Argyl switch engine?

A. Yes, sir.

Q. Do you remember some ash cars upon Albion No. 2 siding on July 20, 1909?

A. Yes, sir.

Q. Will you kindly detail to the Court and jury how you handled those cars, how you found them if you took them and put them back?

A. We had to place two empty cars on the switch for slate loading.

Q. How did you find these cars in the siding, these six loaded ash cars?

A. I was not right there when they pulled the cars out. I was taking care of the rear end of the train.

Q. Where did you first see them, were they out in the Pen Argyl branch?

A. When they were pulling them out on the branch.

Q. When they were just pulling them out?

A. Yes, sir.

Q. What was done in reference to braking the cars when they got out on the Pen Argyl branch, if anything?

A. We had to shove them back by Albion No. 2 switch, put on the hand brakes to hold the cars. Brought the other cars back in the switch.

Q. How many hand brakes did you put on?

A. Three.

Q. They held those six cars? You helped put these cars back upon Albion No. 2?

A. Yes, sir.

Q. How did you put them back then?

A. Shoved them back with the engine.

Q. Was any air brake used during that movement?

A. No, sir.

Q. No air in the cylinders at all?

A. No, sir.

Q. Did you do anything toward braking the cars when you left them on Albion siding No. 2?

A. I put on the four rear brakes.

Q. How did you put them on?

A. By hand.

Q. Strongly?

A. As tight as I could pull them.

Q. Can you or can you not tell whether brakes are in good condition, by the movement of the wheels and the looks?

A. Yes, sir.

Q. How were these brakes?

A. In working order.

Q. Did you see any other people braking any of these cars?

A. I saw the conductor and the head man on the head car.

Q. Were any sticks used in braking these cars—brake sticks?

A. No, sir, I did not see none.

Q. Do you know where Brakeman Ackerman is now?

A. No, sir, I do not.

Q. You have seen cars stored upon this Albion No. 2 siding before?

A. Yes, sir.

Q. Did you ever hear of any of them running out?

A. No, sir.

Q. Have you ever seen as many as six loaded cars in there?

A. I saw more. I saw more empty cars.

Q. What is that?

A. I saw more empty cars in there.

Q. Was there anything further you or your crew could have done to have kept those cars in there?

A. No, sir.

Cross-examination.

By MR. DEMMING:

Q. Does not the book of rules require you to notify the agent that those cars are in there?

A. It does not notify the trainmen.

Q. The agent. Does not the rule require you to notify the agent that those cars are in there?

MR. CAMPBELL: That is no cross-examination.

By MR. DEMMING:

Q. Is not that correct?

A. That I do not know.

MR. CAMPBELL: I object. It is introducing secondary evidence about a document he has not called for. In the second place it is not cross-examination, and I ask that it be stricken out.

(I withdraw the objection.)

By MR. DEMMING:

Q. Answer the question.

A. I do not know.

Q. You do not know?

A. No, sir.

Q. You never saw loaded cars standing in on a siding before like that?

A. Loaded cars?

Q. Loaded cars.

A. Yes, sir, I saw loaded cars in there before.

Q. By that answer you mean cars loaded at the quarries?

A. Yes, sir.

Q. They were box cars, were they?

A. Yes, sir.

Q. They were at the upper end of that siding?

A. Yes, sir, the back end of the siding.

Q. You never saw loaded ash cars like these standing down near the Pen Argyl branch, on that siding before?

A. Not before, no, sir.

Q. Not before that?

A. Not to my recollection, no, sir.

Q. The only cars you saw standing there were the empty cars?

A. Empty cars.

Q. Never before this accident did you see six loaded ash cars standing in there in the same position?

A. No, sir.

Q. You put the brakes, you say, on the four rear cars?

A. Yes, sir.

Q. You put them on as hard as they would go. Is that the idea?

A. As hard as I could pull them.

Q. Aside from that, putting the brakes on, and the fact that they went on apparently, you do not know anything about the condition of those brakes?

A. I know they were in working order.

Q. They seemed to be in working order when you put them on? Is that the idea?

A. Yes, sir.

Q. You made no inspection of them?

A. No, sir.

Q. Did not look at the dogs?

A. The dogs were all right. You cannot help but see them.

Q. That is, standing up you look at those?

A. Yes, sir.

Q. You did not look at the dogs. The dogs are down at your feet, are they not?

A. Yes, sir.

Q. When you put the brakes on hard you kick the dog in place, do you not?

A. Yes, sir it takes your foot to put the dog in place.

Q. That is what you mean by saying they were in good condition?

A. Yes sir.

Q. You put no block under yourself?

A. No, sir.

Q. Did you walk down past these cars when you quit your part of it?

A. Yes, sir.

Q. How many blocks did you see under them?

A. One.

Q. Where was that?

A. The head car.

Q. The right hand wheel or left hand?

A. Right hand.

Q. You saw no other block?

A. No, sir.

Re-direct-examination.

By MR. CAMPBELL:

Q. You have seen as many as six cars loaded with material as heavy as ashes upon other sidings with a greater grade have you not?

A. Yes, sir.

Q. Did these cars get away, braked and blocked in the same manner?

A. No, sir.

Re-cross-examination.

By MR. DEMMING:

Q. You say a greater grade?

A. Yes, sir.

Q. Are you estimating that by your eye?

A. No, sir, by experience of holding the cars.

Q. Merely your experience of holding the cars?

A. Yes, sir.

Q. You never had any experience holding cars in on this siding, in this position, before this time, had you?

A. Nothing more than empty cars.

Q. Nothing more than empty cars?

A. No, sir.

By MR. CAMPBELL:

Q. And a good many more than six empty cars?

A. Yes, sir.

WILLIAM SWEENEY, having been duly sworn, was examined as follows:

By MR. CAMPBELL:

Q. What is your business?

A. Assistant superintendent.

Q. Of what?

A. Central Railroad.

Q. Central Railroad of New Jersey?

A. L. & S. Division between Phillipsburg and Scranton.

Q. Of the L. & S. Division between Phillipsburg, New Jersey and Scranton, Pennsylvania?

A. Yes, sir.

Q. How long have you been railroading?

A. Twenty-eight years.

Q. What have been your different positions in that twenty-eight years?

A. Brakeman, conductor, yardmaster, trainmaster, assistant superintendent.

Q. Have you been on any other divisions of the Jersey Central except the L. & S.?

A. I ran through from Penobscot to Jersey City.

Q. On the Jersey Central between Phillipsburg and Scranton did you also take in the branch lines that ran off?

A. Yes, sir.

Q. And lines running through the coal regions?

A. Yes, sir.

Q. A great many of those tracks are at a more heavy grade, are they not?

A. Yes, sir.

Q. In your different railroad positions have you had occasion to look at hand brakes and their efficiency?

A. Yes, sir.

Q. Do you remember being up at Pen Argyl and around Albion siding No. 2 on February 18, 1910?

A. Yes, sir.

Q. Certain tests of six loaded ash cars were made at Albion siding No. 2 at that time?

(Objected to.)

(Question withdrawn.)

Q. Describe what was done there at that time.

MR. DEMMING: Wait a second. I object to any tests being made at any other time.

MR. CAMPBELL: I have not got to the test yet.

By MR. CAMPBELL:

Q. Describe what you did in the neighborhood of Pen Argyl around Albion No. 2 switch on February 18, 1910.

A. We went up there with about six cars on the switch, five brakes on. We started to knock the brakes off.

MR. DEMMING: February 18, 1910, I object to anything that was done that day.

THE COURT: I do not know what it is.

MR. DEMMING: Make an offer.

MR. CAMPBELL: I propose to prove by this witness, who is an expert, that on February 18, 1910, he, in company with some other people, went

to Albion No. 2 switch, and that six loaded ash cars were put in different positions on the siding, and that different brakes were applied, and different blocks put in, and the cars did not move out, under different circumstances.

MR. DEMMING: How long did you leave them there? Put that in.

(Objection overruled.)

(Exception noted for plaintiff by direction of the Court.)

By MR. CAMPBELL:

Q. Go on and describe what you did around Albion No. 2 siding on that day.

A. We knocked off the brakes, started to knock the brakes off of these cars.

Q. They were all braked first?

A. At the rear end of the switch. We knocked them off toward the head end. We knocked all the brakes off of the cars to start, until we came to the last brake. We started with the one brake.

Q. They started with only one brake on?

A. Only one brake on.

Q. Did you make any tests with blocks?

A. Yes, sir.

Q. How many blocks were necessary to hold those six loaded ash cars in there?

A. We shoved the cars back in again and put one block on and they stood there.

Q. Without any brakes?

A. Without any brakes.

Q. What, in your experience, would be necessary to hold six loaded ash cars upon a siding such as No. 2 with the brakes in good condition, the good ordinary way of holding those cars in, how many brakes or blocks?

MR. DEMMING: Objected to unless the witness

knows the conditions under which these cars were placed there on the day of the accident.

MR. CAMPBELL: Under ordinary conditions which we had in July.

By MR. DEMMING:

Q. You never were there in July?

A. I could not say that. I used to run up there for years.

Q. You never tested cars there in July?

A. No, sir.

By MR. CAMPBELL:

Q. What railroad runs right there?

A. I had charge of that branch for two years.

By MR. DEMMING:

Q. Your road and this road were the only two roads running through there?

A. And the New England Railroad.

Q. Does not the New England run on your tracks?

A. No, sir, we run over portion of the New England, Pen Argyl and Bangor Junction. It is our own line from Bangor Junction into Bangor. The New England operated that entire line from Bethlehem Junction to Bangor.

By MR. CAMPBELL:

Q. You are familiar with the surroundings around Pen Argyl different seasons of the year?

A. Yes, sir.

By MR. DEMMING:

Q. Are you familiar with the surroundings of this siding?

A. I never saw that siding only that one day.

Q. That was in February, 1910?

A. Yes, sir.

Q. The first and only time you saw it?

A. Yes, sir.

By MR. CAMPBELL:

Q. I suppose you have seen a few sidings of that grade around the country?

A. Yes, sir.

Q. What in your estimation, taking this Albion siding No. 2, would be necessary for a down grade to keep those cars in there safely?

(Objected to.)

By MR. CAMPBELL:

Q. The ordinary safety, not to absolutely insure everything?

(Objected to.)

(Objection overruled.)

A. Six loaded ash cars in that siding, three brakes would hold them there forever.

Q. Three brakes would hold them there forever?

A. Yes, sir.

Q. Would any blocks be necessary?

A. No, sir.

Q. No blocks at all necessary?

A. No, sir, no blocks necessary.

Q. Do you know anything about derailing devices?

A. Only that we have them on our road.

Q. How long have you had them on your road?

A. I have seen derailers when I first started to railroad.

Q. Are all sidings with the grade toward the main line, or main branch equipped with derails even now in your line?

A. They are now.

Q. Were they two years ago?

A. No, sir, not all. They have been equipping them right along.

Q. They have been equipping them right along?

A. Yes, sir.

Q. Like other railroads?

A. Yes, sir.

(Objected to.)

MR. CAMPBELL: Strike that question and answer out.

By MR. CAMPBELL:

Q. Were they in universal use on all railroads in this country, or in the eastern portion of the United States, and the northeastern part of Pennsylvania in July, 1909, as testified to by Mr. Weeks and another expert?

A. No, sir.

Cross-examination.

By MR. DEMMING:

Q. When did you first go railroading?

A. 25th of September, 1883.

Q. You saw a derailing device then?

A. I sure did.

Q. Where was that, what road?

A. On the Jersey Central.

Q. Where did they have them, under what conditions?

A. They had them around the colliery tracks where employees dropped cars from the breakers to run on to our branch main tracks or to our main line. They were put in there on account of those boys not being familiar with the handling of cars, and for the protection, of course, of the Central Railroad, these devices were put in.

Q. They are put in on the sidings approaching the main line, and on down grades, are they not?

A. They are put in on the level also.

Q. On the level too?

A. On the dead level.

Q. On level sidings?

A. Yes, sir.

Q. Their purpose is to protect the main line, is it?

A. Yes, sir, that is the idea.

Q. How important do you consider that with regard to sidings approaching a main line and on a down grade?

A. I consider it very important.

Q. Very important?

A. Yes, sir.

Q. How long have you so considered it?

A. Possibly for the last six or eight years or more.

Q. More than that?

A. Yes, sir.

Q. Were they not customary and ordinary devices in 1909 on railroads?

MR. CAMPBELL: Objected to as stating a conclusion.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

By MR. DEMMING:

Q. Were or were they not customary and ordinary devices in 1909?

A. I told you I seen these derailleurs—

Q. Answer that question first.

A. I told you I seen these derailleurs as far back as 1883. They have been putting in derailleurs since that time and up to the present time.

Q. Were they or not customary and ordinary?

A. No, sir.

Q. Customary and ordinary devices on railroads in 1909?

A. No, sir—in 1899?

Q. No, sir, 1909, two years ago?

A. They were putting them in that time. All tracks were not equipped with these devices at that time.

Q. What railroad are you referring to now?

A. I refer to the railroad I am working on.

Q. Which one is that?

A. New Jersey Central.

Q. Is that the only railroad you are referring to?

A. And other railroads that I have seen also.

Q. Were they not on the sidings of the Delaware, Lackawanna and Western at that time?

A. Not on all sidings.

Q. Sidings approaching the main line and on down grade?

A. No, sir, they were not.

Q. On most all its sidings?

A. I do not know about all their sidings. They were not in some of them, that is sure.

Q. Sidings run into each other, do they not?

A. No, sir.

Q. Sidings run into branch tracks?

A. No, sir.

Q. What do they do?

A. Sidings run on the main line.

Q. The last siding of all connecting with the main line was not that so equipped with a derailing device?

A. No, sir.

Q. It was not?

A. No, sir.

Q. In 1909?

A. No, sir, not for side tracks.

Q. What is that?

A. Not all side tracks entering it.

Q. Where they approach on a down grade to the main line?

A. On a down grade.

Q. On a down grade they were?

A. They were not.

Q. When you answered the question which railroad had you in mind?

A. I have in mind the railroad I am working on, the one I told you, the Jersey Central.

Q. The Jersey Central?

A. Yes, sir.

Q. What proportion of sidings were so equipped in 1909?

A. I could not tell you that.

Q. With a down grade approaching the main line?

A. With a down grade there were lots of sidings they were not equipped.

Q. Sidings on which cars were expected to stand?

A. Cars expect to stand.

Q. What is that?

A. Yes, sir.

Q. You say yes to that?

A. Yes, sir, they were not equipping the sidings that stood on down grade with derailing devices.

Q. Where cars were accustomed to stand, that might run away, not so equipped?

A. I answered that.

Q. Not so equipped?

A. I answered that. I said, No.

Q. Were they in customary and ordinary use on the Philadelphia and Reading in 1909?

A. I never worked on the Philadelphia and Reading.

Q. Did you ever work on the Delaware, Lackawanna and Western?

A. I never worked on the Lackawanna and Western.

Q. How can you answer with regard to the Delaware, Lackawanna and Western?

A. I did not stay in one spot all the time. I travel around. I go over the Lackawanna, I go over the Lehigh Valley Railroad, going and coming from my work. Wherever my business carries me.

Q. How can you answer that derailing question with regard to the Delaware, Lackawanna and Western and not with regard to the Reading?

A. Because we operate over a portion of the Lackawanna.

Q. Your answer only referred to that portion you operate on?

A. Certain parts of it.

Q. What part was that?

A. On the Bloomsburg Division.

Q. That is west of Scranton, is it not?

A. No, sir, this Bloomsburg Division runs from Scranton to Northumberland.

Q. It is not anywhere at all in the vicinity of this road?

A. The Reading?

Q. No, sir, of this Bangor and Portland?

A. No, sir.

Q. Should this Albion siding No. 2 have been equipped with derailing devices?

A. Not necessarily.

Q. You do not think it was necessary?

A. For the protection of those cars. To hold those cars there it was not necessary.

Q. You finished your answer, did you not?

A. I say as far as the holding or the safety of those cars were concerned, with the brakes properly applied there was no occasion for a derailing device.

Q. Which cars are you referring to, with the cars you experimented with?

A. Or any other cars that are put in there in proper shape.

Q. You are assuming they are put in proper shape, and you are assuming also that they are properly braked, are you not, in answer to that question?

A. They would not be left stand there if they were not.

Q. You know very well, from your experience as a railroad man, there are two factors enter into the safety of cars standing on a siding, the human factor and the mechanical factor?

A. Yes, sir.

Q. That is true is it not?

A. Yes, sir.

Q. Therefore in saying there should have been no

derailing device you are assuming that both things are true?

A. I say it was not necessary to have a derailing device for the safety of those cars or for the holding of those cars. They would remain there forever with the brakes applied.

Q. Properly applied?

A. The derailing device don't hold the cars.

Q. You are assuming that the brakes were perfectly applied are you not?

A. I am positive, because I do not think there is any railroad man in the country would allow the cars to remain there if they were not properly applied.

Q. You have heard of cars running away before, have you not?

A. No, sir.

Q. Never heard of cars running away?

A. Never seen any cars running away—I have had some awful heavy grades—only where somebody tampered with them.

Q. Have you not heard of them running away?

A. No, sir, I have not heard of any cars running away. I have never seen any on our road.

Q. You personally may not have seen them. You know they have run away?

A. They have not run away on our road.

Q. When you experimented with these cars, carrying on these experiments, where did you place the cars?

A. Back of the frog in this siding.

Q. How far back?

A. Where they were supposed to stand.

Q. You do not know where they stood, the cars that ran away, do you? You do not know where they stood, do you?

A. When they ran away?

Q. Yes, sir.

A. No, sir, I did not see these cars that ran away.

Q. Who all was there at the experiment?

A. Mr. Parry of the Lehigh Valley Railroad, Mr. Cizek, superintendent of the Bangor and Portland, Mr. Griffith, trainmaster, and two train crews.

Q. And yourself?

A. Yes, sir.

Q. Any one else?

A. I do not just remember all who were there. I do not know who all were there.

Q. Quite a crowd of you?

A. Yes, sir, there were two train crews and these three men I mentioned.

Q. What kind of cars did you use?

A. D. L. & W. gondola.

Q. How were they loaded?

A. With ashes.

Q. What capacity cars?

A. I think they were the old fifty thousand capacity cars.

Q. How much?

A. Fifty thousand capacity; 25 ton cars. I am not so sure about that, but I think they were from the appearance of the cars.

Q. They were not as heavy a car as these cars that ran away, were they?

A. I do not know what the capacity was of the cars that ran away.

Q. Who put the brakes on?

A. The brakeman.

Q. How many feet back from the point of the switch were they placed?

A. I could not answer that question because I did not pay particular attention how far back they were. They were in good clearance, possibly about half a car length.

Q. Only half a car length in?

A. From the frog, back of the frog.

Q. They just cleared the Pen Argyl branch, did they not?

A. No, sir, very much clear. Just clear and very much clear are two different things.

Q. By good clearance you mean that trains on the Pen Argyl branch could have gone by without hitting them?

A. Yes, sir, or anything in the siding, it could not touch those cars.

Q. You do not know how many feet?

A. No, sir.

Q. How long did you let them stand there?

A. I do not know how long they were standing there before we got there.

Q. When you conducted this experiment?

A. We stood the cars there on the tracks; moved the engine away from them.

Q. You saw the engine putting them in, did you not?

A. Yes, sir, I recollect how we picked up the cars and shoved them in there.

Q. How long did you let them stand there?

A. We set all those brakes and got the engine away. Then the brakes were eased off and taken off of there. After that test was made they were shoved back in again. All together, I suppose, might be half or three-quarters of an hour, maybe an hour.

Q. You conducted different experiments at different times to see whether they would move, did you not?

A. Yes, sir.

Q. At each experiment how long were the cars allowed to stand still? Ten minutes, five minutes?

A. Long enough for the brakeman to put the brakes on and knock them off. About ten minutes, I suppose.

Q. Was there any blasting while you were doing this?

A. What do you mean by blasting?

Q. Any of those quarries in that immediate neighborhood blasting?

A. I did not hear them.

Q. Was there any wind?

A. No, sir.

Q. Was there any dew? This was done in the day-time, was it not?

A. In the daytime.

Re-direct-examination.

By MR. CAMPBELL:

Q. As a matter of fact, when cars are allowed to stand a long time, the brakes are stronger, are they not, instead of becoming weaker when cars are loaded?

MR. DEMMING: Objected to as leading.

By MR. CAMPBELL:

Q. Can you tell whether or not the pressure upon the rim of a wheel by the brake shoe is stronger after standing a long while, when the car is loaded?

A. If those cars would move at all, they would have moved the moment the engine got away from them. If they remained there after the engine got away there would be no chance of their getting out there afterwards. The greatest chance was when the engine went away from the cars.

Q. In your experience can a brakeman tell by putting the brake on whether it is good and efficient?

A. Yes, sir, he can tell whether it is a good brake.

Q. What is one of the best ways of testing hand brakes; that is, their efficiency?

A. While the cars are in motion.

Q. That is what you call a running test?

A. Yes, sir.

Re-cross-examination.

By MR. DEMMING:

Q. You say you can tell, the trainman can tell whether a brake is in good condition, simply by putting on the brakes?

A. He has a very, very good idea.

Q. Has he an absolute idea?

A. To have an absolute idea of course he would have to see that the shoes were against the wheels.

Q. That is the only real test, is it not, to see? The object of turning the brake is to get the shoe against the wheel, is it not? You might turn the brake and the shoe not be against the wheel? Is not that correct?

A. It may be possible.

Q. What is that?

A. There may be a possibility of that.

Q. Might be a kink in the chain?

A. You could tell it.

Q. What is that?

A. You can feel that.

Q. You could put the brake on hard and the kink in that chain will be there?

A. No, sir.

Q. You do not think so?

A. No, sir, not as much as when the shoe is free.

Q. But it might be there with the brake put on?

A. Yes, sir, if it did not come in contact with the shaft.

Q. When cars are left standing, is it not a well recognized rule with all railroad men that the wind may blow them out?

A. I never seen any wind blow them.

Q. Have not you heard of that? Don't the railroad men recognize it?

A. A cyclone might possibly have done it, or something of that sort.

Q. Have not you got rules for that purpose, rules regarding the wind blowing cars out of the siding?

A. We have rules to secure the cars properly.

Q. Don't those rules refer to wind?

A. The rules do not refer to the wind blowing cars away after they are properly secured. I never seen any.

Q. You never saw the rules or never saw the cars?

A. I never heard of any wind blowing cars away when they were properly secured.

Q. How much pressure can the wind exert on the end of the car?

A. I do not know, it would depend greatly on what kind of wind it was.

Q. Do you know Rule 401 of the Delaware, Lackawanna and Western? Don't you know that rule refers to that particular point?

A. I am not working on the Lackawanna Railroad.

Q. You are testifying about some of their sidings?

A. I am testifying about cars standing properly secured on a siding. I am not testifying about the Lackawanna nor the rules.

Q. You do not mean to testify about any of the derailing devices?

A. I do not know anything about the rules of the Lackawanna Railroad. I am not an employee of the Lackawanna.

Q. Have you got a rule on your railroad with regard to wind blowing cars standing on the siding?

THE COURT: We will not go into that.

By MR. DEMMING:

Q. Are there not many conditions entering into the safety of cars standing on a siding such as this, as to whether or not those cars will stay there or move out?

A. I said that these cars if they were properly secured——

Q. Answer that first.

A. I told you that——

Q. You can answer that question?

A. I am answering you now. I want to answer you now. I told you that cars that were properly secured would not move out of the side tracks.

Q. Explain what condition you mean entering into that.

A. Brakes properly applied.

Q. And by that what do you mean?

A. That they were applied; that they were on.

Q. You mean by that the brakes are in perfect condition, do you not? You mean the brakes and the shoes are properly applied?

A. That is the sense of it, that is the idea.

Q. And that no external force exists to move them out? That is what you mean?

(Not answered.)

By MR. CAMPBELL:

Q. These cars had been standing upon that siding, from July 19th until July 20th, held by five brakes only; they were taken out on July 20th, nearly twenty-four hours afterwards and put on the Pen Argyl branch, which is a steeper grade, and three brakes held them. They were then placed back on the Albion siding No. 2, which had a one per cent. grade, and the brakeman testified that they put on four brakes on the four rear cars and one double on the first car, Would you say that they would be able to tell then whether or not those brakes were in good condition, taking into account these previous tests?

(Objected to.)

(Objection overruled.)

(Exception noted for plaintiff by direction of the Court.)

A. Yes, sir, the fact that they stood on that heavier grade proves that.

By MR. DEMMING:

Q. Notwithstanding the fact that they only stood a very short time?

A. It would not make any difference. The very moment they are placed after those brakes hold them, that tells the tale.

Q. Notwithstanding the fact in the second case

they are blocked when put on the siding; that would not make any difference?

A. That is an extra precaution. Those three brakes held the cars on the heavier grade.

Q. You are asked about the testing of the brakes.

A. That is a clean pure test. It could not be any better. The proof of the pudding is in eating it.

FRANK B. PARRY, having been duly sworn, was examined as follows:

By MR. CAMPBELL:

Q. Where do you live?

A. Easton, Pennsylvania.

Q. What is your business?

A. Trainmaster, Lehigh Valley Railroad.

Q. How long have you been railroading?

A. Twenty-two years.

Q. With what companies have you been?

A. The Delaware & Hudson and the Lehigh Valley.

Q. In what capacities?

A. Telegraph operator, yardmaster, train despatcher, chief train despatcher, and trainmaster.

Q. Were you at Pen Argyl and Albion siding No. 2, in that vicinity, on February 18, 1910?

A. Yes, sir.

Q. Do you remember certain tests that were made on six loaded ash cars on that date?

A. Yes, sir.

(Counsel for plaintiff makes the same objection to the testimony of this witness as to the testimony of the former witness. The same ruling. Exception for plaintiff noted by direction of the Court.)

Q. Detail in your own way just what those tests were.

A. As I remember, when we went there we found six cars of ashes on that siding. The brakeman started to leave the brakes off from the rear end; that is, the first car on the siding. When he got the five brakes off, the cars started out. The cars were pushed back on the siding again and a block put ahead of the wheel to hold the cars.

Q. One block held the cars without any brakes?

A. Yes, sir.

Q. And two brakes held the cars without any blocks?

A. No, I said that the block held the cars without brakes, after they had pushed them back the second time.

Q. In the first test, when there were no blocks there, I understand you had five cars braked?

A. Yes, sir.

Q. Or six cars braked; and then released four of them, and leaving two, and that held the cars, and when you released the second one, the cars ran off with the one brake?

A. That is it.

Q. Two brakes held the train?

A. That is right.

Q. Can a brakeman handling a hand brake, pulling it up, tell whether or not the brake is in good condition and that the shoe comes in contact with the rim?

A. Yes, as a general rule.

Q. When can't he?

A. If there is some bad brake, defective, he might not be able to tell.

Q. Suppose these six loaded ash cars were on Albion siding No. 2 for upwards of twenty-four hours, with five brakes upon them and no blocks, and these cars after twenty-four hours were taken out and put on the Pen Argyl branch where the grade is steeper, and the whole train is held by three brakes, and they stay there during the time necessary to put in two box

cars at the rear of the siding, and they are then placed back on Albion siding No. 2, could you tell whether or not then the man braking the cars could discover defects when he was putting on the brakes?

A. Could he discover?

Q. Yes.

A. Yes, if he was an experienced brakeman he should be able to discover if there is any defect in those brakes.

Q. These cars had had those tests?

A. Yes, sir.

Q. Would those tests show any such defects as you made a condition in your previous answer?

A. I think they would, yes.

Q. Did you ever hear of cars drifting away from a siding such as Albion siding No. 2 or one similar thereto, braked and blocked in the manner in which it has been described these cars were?

A. I never have.

Q. In all your experience?

A. No.

Q. Are you familiar with derails?

A. Yes, sir.

Q. Are all sidings approaching any line of the Lehigh Valley Railroad upon which passenger trains are run, on descending grade, equipped with derails, or were they in July, 1909?

A. No, they were not all equipped.

Q. They were equipping them?

A. Working at it, yes, sir.

Q. It has been testified to by one or two experts upon the other side that derails were in universal use upon railroads in the eastern part of Pennsylvania in July, 1909. Tell us from your experience as a railroad man on the Lehigh Valley and from your observation of other railroads, whether or not that is true?

A. No, I do not think that is so.

Cross-examination.

By MR. DEMMING:

Q. Tell us why you do not think that is so, about the derails being customary and ordinary devices in 1909.

(Objected to by counsel for defendant, on the ground that the testimony of the witness is not properly stated in the question.)

Q. In 1909 were derailing devices in customary and ordinary use?

A. They were being used. They were not generally used on all the roads, or on the Lehigh Valley at that time.

Q. I am speaking now with reference to sidings approaching the main line on down grade where cars were accustomed to stand and be left alone.

A. All sidings were not equipped at that time, although we were working at it to equip all sidings.

Q. Of that kind?

A. Yes, sir.

Q. How about on the Delaware, Lackawanna & Western, if you know?

A. I do not know.

Q. You do not know?

A. No, sir.

Q. How about on the Reading, if you know?

A. I do not know.

Q. How about on the Pennsylvania, if you know?

A. I do not know.

Q. On the New York Central, if you know?

A. I do not know.

Q. West Jersey & Seashore, if you know?

A. I do not know.

Q. The Central Railroad of New Jersey, if you know?

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Q. West Jersey & Seashore, if you know?

A. I do not know.

Q. The Central Railroad of New Jersey, if you know?

A. They were working at them, the same as on the Valley at that time.

Q. Were not the majority of the sidings of that nature so equipped?

A. No; I would not say the majority were, but a large number. I do not think the majority were.

Q. A very large number?

A. A large number.

Q. How long have you known of derailing devices?

A. Ever since I started with the railroad.

Q. That is how long?

A. Twenty-two years.

Q. And under what conditions are they put in?

A. Usually where the grade is towards the main line.

Q. Of sidings where cars are accustomed to stand, is that correct?

A. Just now, yes, sir.

Q. What is that?

A. Where they are installing them now, yes.

Q. At the time you first knew about it?

A. No; the first time I knew, there were very few on the side tracks, mostly in the main line.

Q. That was twenty-two years ago?

A. Yes, sir.

Q. You were asked the question, supposing these cars had been standing on Albion siding No. 2 and were moved out and then stood on the Pen Argyl branch, and then moved back and allowed to stand there again, whether or not that was a proper test of the brakes. I believe you said that that would be. Did you or did you not say that that would be a test?

A. That would be a test; yes, sir.

Q. Would it be a positive test?

A. Yes, sir.

Q. Entering into that answer, would it not depend upon where those cars had been standing on Albion No. 2 with regard to the grade?

A. Well, the grade had something to do with it.

Q. Suppose they were standing on the level part

of the siding; that would be no test of the brakes, would it?

(Objected to by counsel for defendant.)

Q. Supposing that as many of the six cars as could be would be standing on the level part of that siding; would that be a test of the brakes?

A. How many brakes applied?

Q. I am asking you; you answered that question.

A. I do not know. You are putting the question to me in a different way. If you are going to stand cars on the level part of the switch, you do not need as many brakes applied to hold them as if they all stood above the level part.

Q. The question was whether that would be a good test of the brakes. You cannot test a brake on a car on a level track, can you?

A. Not very well.

Q. You say that if any experienced brakeman put on a brake you think he could tell whether or not that brake was in good condition?

A. Yes, sir.

Q. Is that a positive test of the brake?

A. As positive as you could make, yes.

Q. As positive as you could make it, but it is not an absolutely positive test, is it?

A. I would consider it so.

Q. Is there any way of making a test positive of a brake other than examining the brake parts all the way from the wheel down to the shoe?

A. Yes, sir.

Q. There is?

A. Yes, sir.

Q. What other way is there?

A. Apply the brakes when the car is in motion.

Q. But not apply the brakes when the cars are standing and release them one after another; that is no test, is it?

A. I do not know why it would not be a test.

Q. You think that would be a test of the brakes?

A. Yes, sir.

Q. What conditions, in your opinion, enter into whether or not a brake is efficient in holding?

A. The way the shoe is applied against the wheels can be told by the brakeman operating the brake. If there was some condition that would not permit the shoe to get close to the wheels, you can very readily tell that by operation of the brakes.

Q. Do you mean to say, by that, that if you experiment a while back and forth, keep on doing that—

A. No; the ordinary wind of the brake shaft, brake wheel, rather.

Q. Supposing there should be a kink in the chain.

A. I do not know as that would have a great deal to do with it.

Q. You mean, by that answer, that if there is a kink in the chain the shoe would still be tight?

A. Yes, sir.

Q. But if there is a kink in the chain and the cars are allowed to stand, might not that kink come out?

A. I do not think it would under that pressure; no, sir.

Q. It might, though, might it not?

A. I do not recall any case of that kind in my experience.

Q. Suppose the ratchet wheels would be cracked; that might give in time, might it not?

A. It is possible that it would, yes.

Q. The ratchet wheel could be worn or cracked and not be seen by the brakeman in the ordinary operation of putting on the brake, could it not?

A. If it was worn so bad, the brakeman would notice it when he was applying the brake.

Q. If it was worn so bad that he would have noticed it?

A. Yes.

Q. Railroad men sometimes drive nails in to fasten them, do they not?

A. I have seen that done; yes, sir.

Q. They can work loose, can they not?

A. Not very well, if they were nailed.

Q. You have known them to work loose, have you not?

A. Not after they were nailed; no, sir.

Q. Not after they were nailed?

A. No.

Q. But the purpose of putting on the brakes is finally to get the shoe tight against the wheel, the rim of the wheel, and to hold it there, is it not?

A. Yes, sir; that is the idea.

Q. When brakes are allowed to stand for any considerable time, isn't there some give in them?

A. No; not a great deal.

Q. Do not their parts slacken somewhat with time?

A. In certain climates they might be affected a little.

Q. At certain times?

A. Climates.

Q. If brakes are put on with a loaded car, say, or on any car, and the load on that car increases from any reason at all, doesn't that swing the brakes?

A. I do not know how it would.

Q. Don't you know that it sometimes does?

A. No, sir; never heard of a case at all.

Q. When you conducted this so-called experiment where did you put these cars on the siding, what part of the siding?

A. I think we put them back about two hundred feet from the frog, maybe a little more.

Q. You mean the first car that far back?

A. No, the last car.

Q. Confine your attention to the first car of the six towards the Pen Argyl branch, where would that be standing?

A. That was standing five cars back of the one next to the frog.

Q. The first car towards the Pen Argyl branch of the six cars, where would that stand?

A. I do not know what you call the Pen Argyl branch. I do not know anything about that branch. I know the tracks are there.

Q. The Pen Argyl branch would be the line leading up to Pen Argyl, would it not?

A. Yes, sir.

Q. Supposing that is the Pen Argyl branch, and supposing this is the Albion siding No. 2 (showing sketch to witness), with reference to the Pen Argyl branch, how far away from the Pen Argyl branch was the first car of those six cars?

A. About three hundred or three hundred and fifty feet, I judge.

Q. Three hundred feet?

A. From the switch, yes.

Q. Do you understand the question?

A. I thought I did.

Q. I am talking about the experiment that you conducted on the Albion No. 2 siding.

A. That first car of the six went in here (indicating).

Q. Call this the first car, towards the Pen Argyl branch.

A. Yes, this way. That stood about two hundred or two hundred and fifty feet from the Pen Argyl branch on this track.

Q. From the point of the switch?

A. No; that is from the frog I pointed out there. I said about three hundred or three hundred and fifty feet from the point of the switch; about two hundred or two hundred and fifty feet from the frog.

Q. You have been in this court room right along, have you not?

A. Yes, sir.

Q. You heard it testified to that these cars that ran away were placed about one hundred and seventy-five feet to one hundred and eighty feet—

A. I do not know what I heard; I know we measured there that day.

Q. You heard that, did you not?

A. I do not remember that I heard anybody say one hundred and seventy-five feet.

Q. If that is so, you did not place these cars, when you carried on that experiment, at the same place that the cars were that ran away, did you?

A. They were supposed to be placed there, yes, sir.

Q. They were placed only hundred seventy-five to a hundred and eighty feet from the point of the switch, were they?

A. I told you I thought they were placed about two hundred or two hundred and fifty feet. That is as I remember it now.

Q. Now you say two hundred or two hundred and fifty?

A. From the frog, yes, sir.

Q. Did you not, as a matter of fact, place them at different places?

A. No; placed them is one place, as I remember.

Q. Only one place; and how long did it take to conduct this experiment?

A. I guess altogether we were there some three-quarters of an hour.

Q. How long were the cars allowed to stand there in the test?

A. After the brakes were released the first time?

Q. During this experiment.

A. Which experiment do you mean? We found them there when we went there; they were dropped out, and pushed back in again. I think they were there about eight or ten minutes.

Q. Were there any blasts while you were doing this?

A. I do not recall that there were any.

Q. Was there any wind?

A. No, sir.

Q. Any dew?

A. No, sir.

Q. Simply done all at one time as quickly as possible, then you went away?

A. Yes, sir.

Q. You say that two brakes—it required two brakes to hold the cars?

A. Yes, sir.

Q. Did you regard those cars then as perfectly safe so far as the main line was concerned?

A. With the two brakes on?

Q. Yes.

A. I would consider three brakes would be sufficient to hold the cars.

Q. You would regard that then, as a perfectly safe condition on the main line, would you?

A. Yes, sir.

Q. You do not know, when that experiment was conducted, whether or not those brakes had previously been inspected and gotten in perfect shape for the purposes of that experiment, do you?

A. I do not.

Q. You say also, within your experiment you found that one block would hold the cars?

A. Yes, sir.

Q. Did you regard that as a safe condition with regard to working on the main line down below?

A. No, I would not regard that as a safe condition.

Q. Then this experiment was not with regard to the safe conditions so far as the operations on the main line were concerned, was it?

A. Yes, sir, it was.

Q. You concluded that one block would be safe?

A. Concluded that one block would hold the cars;

did not conclude that it would be safe, without it remained there.

Q. Was that a siding which in your opinion required a derailing device?

A. I could not answer that. I do not know the conditions up there. The conditions govern the placing of derails a good deal.

Q. Suppose there had been derails on nearby sidings, would you say that that siding required a derail?

(Objected to by counsel for defendant as irrelevant. Objection sustained.)

Q. You do not know the conditions, do you?

A. No.

Re-direct-examination.

By MR. CAMPBELL:

Q. When you used the term "main line" what did you mean?

A. That track that runs by the siding towards Pen Argyl.

Q. Would you call that the main line of the Lackawanna Railroad?

A. No, sir.

Q. What is the main line of the Lehigh Valley?

A. The main tracks.

Q. What division did you say you were on?

A. New Jersey & Lehigh.

Q. And that runs from where to where?

A. Mauch Chunk to Jersey City.

Q. And that is the main line?

A. Yes, sir.

Q. What do you call these little roads north and south of that?

A. Branches.

Q. Little branches; what is this Bangor & Portland, a main line or a branch?

A. It is a branch.

Re-cross-examination.

By MR. DEMMING:

Q. A branch of the great Delaware & Lackawanna system, is it not?

A. Yes, sir.

Q. Each little railroad has its own main line, has it not?

A. It has a main track, yes.

Q. That is what we mean; the main track is the track going from Nazareth to Portland?

A. Yes, sir.

Q. And that was just below this siding, was it not?

A. Yes, sir.

Q. And do not passenger trains run on that main track and on the Pen Argyl branch both?

A. I believe they have a few there.

By MR. CAMPBELL:

Q. Did you ever see any passenger trains on the Bangor & Portland road?

A. I do not recall that I did; I do not recall that I ever saw a passenger train there.

By MR. DEMMING:

Q. How did you get there?

A. Went up on a special car and engine.

Q. You do not doubt that passenger trains run on that road, do you?

A. Yes, I have some doubt about it. I believe they run some kind of an accommodation. I do not think they carry accommodation. The street cars are so frequent in that country that I do not think they carry passengers, very few.

Q. Have they not a ticket office at Pen Argyl?

A. In connection with the freight offices, yes, sir.

Q. You can buy tickets to ride as a passenger?

A. Yes, if you have time enough.

Recess until 2 p. m.

2 p. m.

P. J. LANGAN, having been duly sworn, was examined as follows:

By MR. CAMPBELL:

Q. Where do you live?

A. Scranton, Pa.

Q. What is your business?

A. General air brake inspector for the Lackawanna system.

Q. How long have you been such?

A. In that position?

Q. Yes.

A. Since August, 1900.

Q. Do you have charge of hand brakes as well?

A. All brake appliances on cars and locomotives.

Q. Over the whole Lackawanna system?

A. The whole system.

Q. How long have you been railroading?

A. Since 1885; that is, engaged in railroad work.

Q. You have heard Mr. Riegel, the expert called upon the other side, testify to certain brake tests and certain efficiencies of brakes. I want you to explain to the jury just what kind of brakes there were upon these cars and how they were operated and about how defects are discovered, in a general way.

By MR. DEMMING:

Q. Did you see the cars on this siding that ran away?

A. Did I see those particular cars?

Q. Yes.

A. On that day?

Q. Any day.

A. You mean during my career?

Q. At any time.

A. The Lackawanna has over 30,000 cars and I would not pick any individual cars.

By MR. CAMPBELL:

Q. You know the classes of those cars?

A. I am familiar with the classes.

Q. Go on.

A. The cars were known as gondola cars, equipped with Westinghouse air brakes. The Lackawanna has no cars equipped with any other type of brake. The hand brake arrangement is in unison with the air brake; that is, the same levers used in connection with operating the air brake are identically the same used with a hand brake, excepting there is a connecting rod and chain, which extends from the cylinder lever to the brake shaft, the air brake shaft. The method of application is based on a cylinder whose power is predetermined by the pressure; in other words, by a system of levers that multiply the power eight times greater at the brake shoes than we do the power developed in the brake cylinder. That is done by a system of levers, which were submitted here in blue print form. To give you an idea of how that is based, an 8-inch brake cylinder on a car, the area is $50\frac{1}{2}$ square inches, approximately that. The brake pipe pressure carried is supposed to be 70 pounds. It can be changed, but it is upon a basis—

MR. DEMMING: Does your Honor think this is important? No air brakes were put on these cars. It is simply a waste of time.

THE COURT: I understand he is describing the mechanism that attaches to the wheels.

MR. DEMMING: No, he is describing air brakes now.

By THE COURT:

Q. The air uses the same brake that the hand brake uses, does it not?

A. Yes, your Honor.

By MR. DEMMING:

Q. But when you put on the hand brake you do not put on the air?

A. When you put on the hand brake you operate all the levers that are operating when the air is applied.

By THE COURT:

Q. The power comes from air in one instance and in the other it comes from the man?

A. In the one instance it is applied by the air pressure; in the other it is the hand brake application by the man.

Q. But the levers are the same?

A. Identically the same.

By MR. CAMPBELL:

Q. Go on, briefly and quickly, because we are anxious to expedite the case.

A. The braking power is based on the light weight of the car, and the hand brake power is also based on the light weight of the car. The hand brake power is from 60 to 70 per cent. of the light weight and the air brake power is based on 70 per cent. of the light weight, so that there is practically no difference between the hand and air brake power applied to the car. In case of emergency, the pressure in the brake cylinder is augmented by volume from the brake pipe, which does not take place in service, so that in case of emergency we develop 20 per cent. greater power; but that is based on your 70 per cent.

Q. In putting cars in upon a siding, which brake is more efficient, the air brake or hand brake?

A. The efficiency depends on the application, how it is applied.

Q. Would cars braked by air stand upon a siding longer than cars braked by hand?

A. I would say no, if you depended on the air brake alone and not the hand brake.

Q. Could a brakeman operating a hand brake tell by the motion, and from what he could see while he was operating the brake, whether or not they were in good condition?

A. That is the best efficiency test known.

Q. You have been here during all this trial?

A. Yes.

Q. You have heard that six loaded ash cars were placed on Albion siding No. 2 and stood there for upwards of 24 hours with five brakes on and no blocks; that, in order to take those cars out of there, it was necessary to release the brakes, because the locomotive could not pull them out; they were then taken and put on Pen Argyl branch, which has a greater grade, and three brakes held them. They were afterwards then put back on Albion No. 2 again, and the only testimony in the case is that the four rear cars were braked, the front car was double braked, and some blocks were put under it. Now can you tell us whether the two brakemen operating those brakes,—or three, I believe,—could tell from the motion of the staff, and the feel, whether or not those brakes were in good condition?

A. I would say yes.

Q. Take six gondola cars of 60,000 pounds capacity on a 1 per cent. grade; how many brakes in good condition would you say would hold those cars?

A. With the cars standing?

Q. With the cars standing.

A. One good brake will hold six cars on a 1 per cent. grade, if properly applied, if the brake is in good condition.

Q. What do you call good condition?

A. What we call good condition is the average condition, where there is nothing to prevent the brake shoes from being drawn properly against the wheels, and where the percentage of brake power is correct.

Q. If brakes are put on, in good order, in July—no dew or moisture or rain—what degree of temperature would affect them?

A. I do not think there is a sufficient change in temperature between zero weather and blood heat that would affect them.

Q. Is a one per cent. grade an unusual grade upon the Lackawanna system?

A. Not at all.

Q. How far do the grades run up to on which they store cars, braked?

A. Three and four per cent.

Q. Do you know anything about inspection service of cars upon the Lackawanna? Does it come under your supervision or notice?

A. All cars delivered to the Lackawanna Railroad are inspected by inspectors for that purpose, at all interchange points on the system, and at all terminals.

Q. How about cars that are not delivered to the Lackawanna, the service cars, for instance?

A. In what respect?

Q. The service cars, like these gondola cars, that might be used for company service.

A. They arrive at terminals; for instance, if a car is delivered to us at Martin's Creek, we have a man to examine all cars delivered; if it comes in from Bangor or Portland, there is a man at Portland to inspect the cars for the Bangor & Portland Division.

Cross-examination.

By MR. DEMMING:

Q. As a matter of fact, you do not know when these cars were inspected that ran away, do you?

A. I do.

Q. They might have been out on this road, away from Portland, for some considerable time without inspection, might they not?

A. If they passed a terminal point, they would be inspected.

Q. They might have been out on the road for some considerable time without passing any terminal point?

A. They might have been standing in a passing siding for a month and not be inspected.

Q. They might have been used by the different crews out on the road beyond Portland?

A. Not used at inspection points as I designated.

Q. I understand about your inspection points. Your nearest inspection point is Portland, is it?

A. Bangor.

Q. All cars that come to Bangor are inspected?

A. There is an inspector there for that purpose.

Q. Does he inspect all cars that come there?

A. I would not say that he did.

Q. There is none at Pen Argyl?

A. The man at Bangor is supposed to cover the division, outside of Portland.

Q. He is supposed to?

A. That is the idea.

Q. Now you have said that cars are stored on three and four per cent. grades?

A. Yes, sir.

Q. Are they not stored with derailing devices?

A. I do not want to qualify on derailing devices because I cannot specify the sidings or places at which they are all located. I have been instrumental in having derailing devices put in to protect inspectors on repair tracks.

Q. On what tracks?

A. The repair tracks.

Q. But you have answered the question that cars are stored on three and four per cent. grades?

A. Yes, sir.

Q. Are they not stored with derailing devices?

A. I am not positive whether there is a derailing device in or not.

Q. When cars are stored even on one per cent. grades are they not stored with derailing devices?

A. We have derailing devices on level grades.

Q. As well as on steeper grades?

A. Yes.

Q. How long have they had those derailing devices?

A. To the best of my knowledge, eleven years.

Q. You have said that six cars standing like these six cars, on a 1 per cent. grade, such as is on this siding, at Albion No. 2, could be held with one brake, in perfect condition; is that right?

A. Yes, sir.

Q. By that you mean that that one brake would have to be absolutely perfect and the application of the shoe would be perfect?

A. The application of the brake made with the train standing, not in motion. I do not say that if the train was in motion; I do not say that that one brake would be sufficient. I am speaking of standing friction, not rolling friction.

Q. If the train would be started in motion by some vibration, would that one brake hold?

A. Then I would not say that one brake would be sufficient. I do not say that it would not hold it, but I would not take any chances on one brake holding.

Q. Would you consider that a proper and safe practice with regard to operation of the main line down below that siding?

A. Consider which?

Q. With one brake on?

A. No, I do not consider that anything safe.

Q. With two brakes on?

A. I would consider two brakes safe, yes.

Q. Absolutely safe for operation on the main line below there?

A. Just a minute; you say absolutely safe. Absolute comes in if there are six brakes to be applied, six brakes should be applied. Every brake applied tends to decrease the liability of accident.

Q. Then if you put on six cars the brakes on each one of the six cars should be applied, should they not?

A. I would say yes.

Q. That would be the duty of the trainmen, would it not?

A. That is the duty.

Q. And should they not be blocked also?

A. I would say that that would not be necessary.

Q. Would brakes themselves be sufficient, if put on, in case of a storm or any outside external force?

A. The storm would have no effect on the brakes standing. Now let me qualify that; regardless of the temperature, weather conditions or rail conditions, we operate hundreds of trains daily and our pressure percentage of braking power is a predetermined, or fixed, factor, and we do not take into consideration that any change in temperature or rail will effect the operation.

Q. You do not take it into consideration?

A. The only thing governing in braking power is speed on rails.

Q. When cars are standing still?

A. Standing still, then you have got an entirely different condition. I will say this, that the power required to hold those six cars on that 1 per cent. grade, 50 per cent. less power would be required to hold them than if the six cars had just started.

Q. But on a grade of that sort, in that locality, immediately alongside of a slate quarry and with other slate quarries in the immediate vicinity, where blasting is occurring, and standing over night, what would you say?

A. I would say that the slate quarries would have no effect on the condition whatever.

Q. You would say that?

A. Yes.

Q. And you would say the blasting would have no effect on it?

A. If the blasting would lift the car bodily from the track and drop it back again, then I would change my opinion.

Q. How about partly lifting the car, or shaking the car—vibrating the car?

A. Can it lift that car? Can it lift that weight?

Q. I am asking you as to a safe operation of the road.

A. The safe operation, I have just told you, would be to apply all the brakes on the six cars.

Q. Every one of the brakes?

A. Yes. Now I have not said that it was not safe with two brakes on and I have also said that one brake, properly applied, would hold them standing.

Q. I know you have.

A. Now when you are getting down to absolute safety, that is a different question entirely.

Q. I am asking you as to the proper practice.

A. The proper practice would be to apply all brakes.

Q. And not just one brake or two brakes?

A. No, sir.

Q. And is it not also well recognized that, in addition to putting on the brakes of all cars so standing on grades approaching the main line, that the cars are blocked in addition?

A. We say, "and other necessary precautions taken." That is in the judgment of the men.

Q. We say? What do you mean by "we say"?

A. We have a rule to that effect.

Q. That is the rule of the road?

A. "With other necessary precautions." Now remember, it does not apply to 1 per cent. grades; we have coal trestles that are 3 and 4 per cent. grades—5 per cent. grades. Now we do not designate a 1 per cent. grade or a 1½ per cent. grade, but the rule applies to all grades. It is a matter of judgment in a number of instances to rely upon the judgment of the men who are handling the equipment.

Q. What other precautions are taken on sidings in addition to relying on the judgment of the men?

A. What other precautions?

Q. Yes.

A. Derailing devices.

Q. Then you cannot always rely upon the judgment of the men, can you?

A. If we did not have man failures in railroad work there would be very little cases in court.

Q. You have said that you think a brakeman could tell whether a brake was in good condition—

MR. CAMPBELL: He did not say he thought, he said he knew.

Q. —simply by putting on the brake?

A. I said the running test there that was made.

Q. No, I am referring to standing cars.

A. If I remember rightly, Mr. Campbell—

Q. You can change that or modify that in any way you want.

A. What I want to get at is this, Mr. Campbell went through the moving of those cars, being taken from the siding, being placed on the main track, being held there by hand brakes on a heavier grade, and returned to the siding, and he wanted to know if that was not an efficiency test. I said yes. The cars in motion is the only manner in which you can get efficiency.

Q. But these cars were not in motion. These cars were stood on the Pen Argyl branch, as I understand the testimony. Then they were brought back and stood on Albion Siding No. 2. Now while they were standing on Pen Argyl branch, or while they were standing on Albion Siding No. 2 in both cases the brakes were put on. Do you so understand it?

A. No, I understand that while the cars were being moved out of the siding and placed on the heavier grade, to switch in the two empty cars on the rear portion of the siding, that the hand brakes were applied by those trainmen.

Q. While the cars were in motion?

A. While the cars were in motion.

Q. I do not so understand it.

MR. CAMPBELL: The locomotive tried to pull them out—and that was what was in my question—with those brakes on.

By MR. DEMMING:

Q. Could not the engine itself stop the cars by reversing the engine?

A. The engine could have stopped the cars, yes; not by reversing, I would not say.

Q. By its air brakes?

A. By the brakes on the tender and drivers.

Q. The mere fact of bringing these cars out from Albion Siding No. 2 and then putting them back again does not in itself prove the efficiency of those brakes, does it?

A. The fact of bringing them out and the brakeman testifying to the effect that he applied the hand brakes while they were in motion is an efficiency test and the best method known.

Q. I do not recall any such testimony at that time.

A. I will refer back.

MR. CAMPBELL: Your testimony was not to that effect. I said that these cars had been on Albion No. 2 siding for upwards of twenty-four hours; that the locomotive had attempted to pull them out with the brakes on and could not do it. It was necessary to release the five brakes and the cars were then put upon the Pen Argyl branch and held by three brakes.

MR. DEMMING: While still standing.

MR. CAMPBELL: While still standing, and then put back upon the Albion Siding No. 2 and four brakes put upon the four rear cars and the first car double-braked, and then I asked whether or not the brakeman, using the wheels in braking those cars, could tell from that whether or not the brakes were in good efficient condition.

MR. DEMMING: While standing still.

THE WITNESS: Yes, if the application of three hand brakes would hold six cars on a 2 per cent. grade, does it not prove, beyond any question of doubt, that the application of five hand brakes on a 1 per cent. grade would be more efficient?

By MR. DEMMING:

Q. I am asking you. I do not want to argue with you. You think so, do you?

A. I do.

Q. Now the question is, do you think that the putting on of those brakes in that way, on the three cars while they were standing on the Pen Argyl branch just momentarily, as I understand it, sufficient to put back these box cars, then the replacing of the cars back on Albion Siding No. 2 and putting on the brakes again and the trainmen leaving them there, would that show whether or not these brakes were efficient; that mere act?

A. May I refer back to further testimony now on that question?

Q. Yes, do anything you want to.

A. One of the trainmen testified—

Q. But I would rather you would answer that question.

A. It is in line with the answer to your question.

Q. Very well.

A. One of the trainmen testified that, on a certain day, they went there and tried to remove the cars from this siding without releasing the hand brakes, and could not do it by the locomotive.

Q. At that time the cars were partly on the level part of the siding?

A. That would make no difference. The fact that the tractive effort of that engine is over 28,000 pounds would greatly offset the difference between even your level or your 1 per cent. grade.

Q. Go ahead, will you, and answer the question.

A. I would say that the test made was sufficient. Now let me go further; the application of a hand brake to a car, the brakeman or trainman should see, in one respect, the shoes against the wheel; but even if the shoe is against the wheel—

Q. Or is not?

A. Whether it is or is not—if it is not, then he has got something definite. If it is, taking your own question, does he know the power applied to the wheel?

Q. I am not getting into that question myself, I am asking you.

A. Then I answer your question that that test was sufficient.

Q. Now I ask you this, since you have answered the question that way, can a brakeman tell, by simply putting on the brake—a hand brake—putting it on hard so it does not move any more—that that brake is on properly and sufficiently?

A. I would not say that he could tell—with the car standing?

Q. Yes.

A. I would not say that if a car was standing—now he has got to depend on the deflection of the brake beams to know whether there is any give or not. It may be possible there is a weak link in the chain, or something stretching.

Q. Or a kink in the chain?

A. Well, a kink would not have much to do with it, because the pressure would either loosen the kink or would fasten it to such an extent it would not let go afterwards.

Q. Suppose it was rusty?

A. You could not rust it in twenty-four hours.

Q. But suppose it was rusty when he put it on first?

A. Well, rust—that would depend on the amount of rust. You want to remember that the chain con-

necting the tie rod to the cylinder lever is a link, therefore you have got the combined strength of the two thicknesses of the iron, and that is stronger than the pull rod itself.

Q. This blue print that was put in evidence when Mr. Riegel testified is correct, is it not, in regard to No. 2 and No. 4? These brakes were only on one end of the cars?

A. This is not the type of brake, so far as this class of cars is concerned, according to the print, but the theory of the levers is the same. It is not the type of brake applicable to the cars in the wreck.

Q. That properly and correctly depicts the theory of the working of the levers, does it not?

A. I am telling you that, so far as the outline of the levers is concerned—

Q. Not that one (indicating on print); 2 and 4.

A. This is not the style of the brakes on the cars.

Q. This is another one; that is outside hung and this is inside hung (indicating).

A. That is not the style. The cars that were in this wreck—the 44,000 series, the 15,000 series and the 19,000 series—have a crank shaft, on account of the construction of the hopper, so as to go over and connect. It is a crank shaft about eighteen inches long, which takes the place of a lever, and from there to a fulcrum lever. He has no fulcrum lever shown in here and no intermediate lever chain in here.

Q. How do you know what kind of cars were in this wreck?

A. I have the list in my pocket.

Q. How did you get it?

A. I got it from the car accountant's office.

Q. Do you know of your own knowledge—

(Objected to.)

A. The car record office—may I answer?

Q. Do you know of your own knowledge?

THE COURT: What?

Q. The kind of cars that were in this wreck.

A. I know the kind of cars. I do not know the cars standing there; I know from the numbers the kind of cars in the wreck.

Q. And to what class they belong?

A. The class.

Q. But you got that from somebody else?

A. Yes.

MR. CAMPBELL: Certainly. Where else do you expect him to get it?

MR. DEMMING: Why do you not bring the man here?

MR. CAMPBELL: It is not necessary.

By MR. DEMMING:

Q. All you know about the class of cars is knowledge you obtained from someone else; is it not?

A. Any information that I want in regard to cars, or where they have been, I get through the car record office; that is, where they have been in service. The car record office can give me a record of any car inside of half an hour, as to where the car has been in the past twenty-four hours.

Q. Is there anybody here from your car record office?

MR. CAMPBELL: I object to this line of examination. Your Honor knows what that rule of law is. This is a man called from a railroad office who gets reports from superiors.

By MR. DEMMING:

Q. Is there anything which you want to add to that plan which is not there; any change you want to make?

A. I want to say first that the plan is not correct.

Q. Just show in what way it is not correct.

A. In the first place he goes direct from the cylinder lever to the live truck lever.

Q. Have you got a plan here that is correct?

A. I have not brought any plans with me.

Q. Will you fix that plan so that that correctly depicts it?

A. I will send you a card with all the different types.

Q. But not in time for this trial.

A. I did not know what was coming up here.

Q. You expected to give testimony here, did you not?

A. I got three days' notice to come here.

Q. We prepared that over night.

A. I tell you the plan is not correct.

Q. Can you mark with your pencil a correct plan on there?

A. I can give you a design of the brake if the court orders me to.

Q. Can you not just with a pencil make it on there?

A. No, I do not intend to mark up another man's drawing.

Q. And you will not enlighten us as to the correct plan?

A. If the court orders me to do so I shall do it.

MR. DEMMING: I think this witness, by a little effort, can make this plan correct according to his idea of it.

MR. CAMPBELL: He has explained what it is and it is not cross-examination anyhow.

THE WITNESS: I have already told you that the principle involved—but he has not got a sufficient number of levers.

By MR. DEMMING:

Q. The principle involved is the same as this?

A. But the plan is incorrect.

Q. Answer my question. The principle involved is the same as this?

A. No, if you will let me explain—

Q. Did you not just say that?

A. No; just a minute. He has not got enough multiplying levers in there to develop the power.

Q. Then your plan would have more multiplying levers than that?

A. Exactly.

Q. More levers?

A. Yes, sir.

Q. And, therefore, more means for lost motion?

A. I have explained—

Q. Answer that question, then explain.

A. The more levers and more pins, certainly the more wear there is for lost motion.

Q. And the more possibility of lost motion?

A. But lost motion does not enter—it is not a factor in this case at all.

By MR. CAMPBELL:

Q. Go on and explain in answer to his question.

A. I wish to explain this, that in my first explanation to the jury, or to the court, if you please—

MR. DEMMING: Just wait a minute. I object to the witness making a speech, except in answer to questions.

(Last question and answer read.)

MR. CAMPBELL: He is explaining why. That is perfectly proper.

THE WITNESS: As explained previously, we put on a brake cylinder on that class of car eight inches in diameter. The brake pipe pressure and auxiliary pressure carried for braking purposes is 70 pounds pressure. That develops 60 pounds pressure in the brake cylinder—60 pounds, or the value of that brake cylinder is sixty times the area of the piston, which is $50\frac{1}{2}$ square inches, or approximately 3,000 pounds. Now that is the only value we get out of the cylinder.

By MR. DEMMING:

Q. You are talking about the air cylinder all the time?

A. I am going to tell you why we put in the multiplying levers.

Q. We do not care why, as long as they exist.

THE COURT: Go on.

A. Now we have a braking power developed in the cylinder, or a pressure of a total of 3,000 pounds. I had explained before that the braking power is based on 70 per cent. of the light weight of the car. If the car weighs 30,000 pounds 70 per cent. is 21,000 pounds. Now then, to get 21,000 pounds pressure on the shoes at the wheels we must multiply whatever number of times 3,000 is divided into 21,000, which is 7 to 1. In other words, every pound pressure in the brake cylinder is to deliver—that is, every pound per square inch, is to deliver seven times that amount at the brake shoe. So that if we have 3,000 total, it will deliver 21,000 pounds, and the way Mr. Riegel has shown his design here, it cannot be done with this system of levers. For that reason, we must use the supplementary levers to get our multiplication at the brake shoe.

By MR. CAMPBELL:

Q. Where is the lost motion he is speaking of?

MR. DEMMING: I have not finished with this witness. This is a long speech about something that is not in the case at all.

By MR. DEMMING:

Q. All your answer refers to air brakes, does it not?

A. Hand brakes as well. I have told you before that all levers applicable with the air brake are the same used with the hand brake.

Q. But all that calculation that you made refers to the pressure of the air cylinder?

A. The pressure of the air cylinder is one determining factor for the air pressure. The hand brake power is decided upon in another manner.

Q. What is that other manner?

A. One is the size of the brake wheel on the shaft. The power of determining is based on the average weight of a trainman.

Q. How much.

A. 150 pounds per inch of radius of the brake wheel.

Q. And the strength of the trainman?

A. The strength of the trainman, based on the average of his weight. It is the weight that applies the power.

Q. Now the only difference between the system of braking you have described and this, is that you have more levers than are here?

A. We must have more levers to develop the power.

Q. And therefore, in those more levers, there is more possibility of false motion?

A. The false motion does not cut any figure there. The fact is we must have the levers.

Q. The more levers you have, is it not a mechanical axiom that the more possibility there is of false motion?

A. If we could apply the brake without levers at all we would do so.

Q. Answer the question; is not that correct?

A. Yes.

Q. Is it not true that the only sure test of whether a brake is in efficient condition is by an examination of the parts of the brake, and not by merely putting on the brake through the wheel?

A. An examination of the parts on a standing application would not develop nearly as well a test as a running test, because the shoes may be against the wheel, but the brakeman, or the man who applies it,

cannot tell with what force. When the car is in motion and the brake is applied he gets the efficiency.

Q. But when it is standing still he cannot tell?

A. When it is standing still he cannot get what we call an efficiency test.

Q. And cannot tell whether the shoe is against the rim of the wheel?

A. Oh, he can tell whether the shoe is in contact with the wheel or not; I mean the pressure applied. A shoe may be against the wheel, but it does not designate how much pressure is holding it there.

Q. And it does not designate whether or not that pressure is sufficient to hold the wheel and the car permanently?

A. Permanently?

Q. Yes.

A. That is up to us to determine on all our cars.

Q. I am talking about a brakeman putting on the brake.

A. You are talking about a brakeman?

Q. Yes.

A. I do not suppose we have got a brakeman who could tell you how much pressure he has applied to the wheel.

Q. And the mere putting on of the brake is not sufficient, with the cars standing still, to show to him whether or not the brake is sufficiently efficient to hold the car, is it?

A. I will answer this way for you now: a brakeman setting a car in a siding on a grade, applying a hand brake, the engine detached from it, if he applies that hand brake and the car does not move, he has concluded the test required of him.

Q. He has concluded the test?

A. He has concluded the test required of him.

Q. But is that a sufficient test?

A. That is sufficient, so far as the trainman is concerned.

Q. Is it sufficient so far as the safety of the operation of the main line is concerned below that siding?

A. It is sufficient so far as the operation of the main line is concerned, that one car with the one brake, because our factor of safety is more than 100 per cent.

Q. Are you taking into consideration, in answering that, that it is a siding with a down grade approaching the main line?

A. I will say this, that when we can control trains with hand or air brakes on the heaviest grades, should not that be sufficient—

Q. Do not ask me a question.

A. I will answer it for you. We know this, that the predetermined power, or the fixed factor on the cars, based on a certain percentage and a certain pressure to be carried, that we can control our trains, loaded or empty, on the heaviest grade we have got, is sufficient for us to feel absolutely safe in the setting of a hand brake on any of our grades with holding the car.

Q. Then under what conditions do you put in a derail?

A. We come into that human element again. I can cite you a case that only happened last week, where there was no derail on a passing siding, where we had two trains sideswipe each other.

Q. That is not a similar case, is it, a passing siding?

A. We have them in some passing sidings and we haven't them in others.

Q. Do not the rules forbid derailing devices on passing sidings?

A. Not at all.

Q. They are not customary on passing sidings, are they?

A. Yes, sir.

Q. And customary on other sidings, too?

A. Yes, sir.

Q. And were in 1909?

A. Yes.

Q. And customary on sidings that are level?

A. We put them in for protection. It depends on the class of work. It may be on a repair track.

Q. And they are put in, are they not, as a protection to the operation of the main line and are regarded as necessary and essential for that purpose?

A. Not alone the main line. I have said we put them in on repair tracks, to protect our repair men.

Q. They are for the safety of the operation of the road, the other part of the road; that is correct?

A. Now let me put it this way to you: I can repeat one accident where, due to the derail, an engineer and trainman were killed by the negligence of the trainman in neglecting to throw the derail. So that is not absolute safety; the derail is not absolute safety.

Q. No, there is nothing that is absolutely safe, is there?

A. Not where you depend on the human element.

Q. None of us are absolutely safe in anything we do in life. We are talking about what has come to be regarded as the proper practice.

A. I would say it is good practice to put a derail in.

Q. And was in 1909?

A. I would say back as far as 1900, if you please.

Q. On a siding approaching the main line on a down grade?

A. Either on a siding approaching on a down grade or on a level grade, or on an up grade. I will qualify that by saying this, that on our up grades we use pusher engines on the rear of the train and, due to poor judgment on the part of the man on the lead engine, the pusher engine may push him out onto the main track.

Q. All the matters Mr. Riegel mentioned as entering into the efficiency of a brake are correct, are they not?

A. He said he had about twenty different things that entered into it.

Q. Yes. How many do you make it?

A. I would not consider that the rain had anything to do with it, in the time the cars were standing there. I would not consider that the frost had anything to do with it in the time the cars were standing there.

Q. What time do you mean?

A. The twenty-four hours as testified to.

Q. You would not consider they had, but they might have had?

A. No.

Q. You do not think so?

A. No.

Q. In July?

A. I just told you a minute ago that it required 50 per cent. less power to hold a car standing than if it was in motion, so you have got a factor of safety there of more than 50 per cent.

Q. When you say 50 per cent. do you refer to a grade or a level?

A. A grade; on a level you come in with a greater factor.

Q. When you have the possibility of an outside influence, such as the possibility of a blast, does not that rise?

A. I should say there is no blast I know of, unless it affected the track or roadbed underneath the track, that would be great enough to shake a hand brake loose that was properly applied.

Q. You mean by that unless there was a vibration of the ground?

A. I would not say that a side vibration—it would take an up and down movement to affect it.

Re-direct-examination.

By MR. CAMPBELL:

Q. Now coming down to facts and common-sense,

assuming the story of Mr. Grupe and Mr. Ruch, the brakemen upon these six loaded ash cars, to be true, would you say that those cars could get out of the siding by reason of anything that you know of?

MR. DEMMING: Does your Honor think we should go into this all again? Mr. Campbell had his opportunity to examine the witness in the first place.

THE COURT: Answer the question.

A. I would say that the cars could not get out of the siding unless the brakes were released.

Re-cross-examination.

By MR. DEMMING:

Q. And unless also there was some possible defect in the brakes?

A. The release of a brake could be by defect or otherwise, but if the brake is released—

Q. That is, by the action of the brake itself, or the brake parts?

A. I do not know of a case where the brake has released itself, a hand brake that was in proper condition.

Q. You are assuming it was in proper condition?

A. Assuming from the testimony as given by the train crew.

H. E. GRIFFITH, recalled.

By MR. CAMPBELL:

Q. What is your position?

A. Trainmaster.

Q. Of the Bangor & Portland Division of the Delaware, Lackawanna & Western Railroad?

A. Yes, sir.

Q. Did you see these six loaded ash cars in the siding in July, 1909?

A. Yes, sir.

Q. When? You did not inspect the cars?

A. Oh, no.

Q. You were present on February 18, 1910, when certain tests were made?

A. Yes, sir.

Q. Did you see the test of these cars?

(Objected to for the same reason as before.)

(Objection overruled.)

Q. Go on and describe what tests you saw.

A. We placed six cars of ashes in the siding, with all the brakes on, released all the brakes, had a block under the front wheel and it held the cars. The block held the cars, one block.

Q. What sort of a railroad is this B. & P. Division? Is it the main line of the Delaware, Lackawanna & Western system, as Mr. Demming has been calling it?

MR. DEMMING: I have not called it the main line of the Delaware, Lackawanna & Western system at all.

A. No, sir.

Q. What is it? Describe what it is.

A. We always consider it as a yard from one end to the other.

Q. The whole system is practically a yard?

A. Practically a yard. We have more side tracks than we have other tracks.

Q. Is it not, as a matter of fact, for the gathering of the cement and slate as a feeder of the Lackawanna system?

A. Yes, sir.

Q. Practically a yard?

A. Yes, sir.

Cross-examination.

By MR. DEMMING:

Q. Do you mean to say that the Bangor & Portland Division is not a railroad by itself connecting with the

Delaware, Lackawanna & Western as that division of the Delaware, Lackawanna & Western?

A. We deliver cars to them, yes, sir, at Portland.

Q. You do not use it as a railroad feeding to the Delaware, Lackawanna and Western?

A. It is a railroad, yes, sir.

Q. Do you not run passenger trains on it?

A. We run a mixed train, as well as freight cars.

Q. Do you not carry passengers?

A. Yes, sir.

Q. And do you not have a main line and main track?

A. Main track, yes, sir, connects up with the different yards. We have more sidings than we have main track.

By THE COURT:

Q. At the stations there you can buy a passenger ticket for anywhere on the Bangor & Portland or on the Lackawanna Railroad?

A. Yes, sir.

By MR. DEMMING:

Q. At all the stations you have ticket offices?

A. Not all of them; where there are tickets sold.

Q. When these so-called tests were conducted, they were in February, 1910, were they not?

A. Yes, sir.

Q. What kind of cars did you put in there?

A. Gondala cars, loaded with cinders.

Q. The same kind of cars exactly as the cars that ran away?

A. I would not say that.

Q. You would not say that? You do not know, do you?

A. They were pretty near the same.

Q. Do you know?

A. A different series; they were coal cars.

Q. Won't you answer my question? Do you know

whether they were the same kind of cars as the cars that ran away?

A. I saw both sets of cars, yes, sir.

Q. What part of the siding were they put on?

A. The head end of the siding.

Q. Which end?

A. The head end.

Q. What do you call the head end?

A. There is only one head end to it, leads into the siding.

Q. Is the head end the end at Pen Argyl branch or up at the end of the quarry?

A. There is no connection at the quarry end of the switch. It is a stub end switch.

Q. What do you call the stub end?

A. There are two kinds of sidings, a double ended siding or stub siding.

Q. I am talking about this particular siding.

A. In other words, the cars were placed in Albion No. 2 siding possibly 15 or 20 feet from the frog.

Q. They were placed 15 or 20 feet from the frog?

A. Yes, sir.

Q. The first car?

A. Yes, sir.

Q. You have heard the testimony of Mr. Parry?

A. Yes, sir.

Q. He was present at these so-called tests also, was he not?

A. Yes, sir.

Q. And he said they were placed 200, 250 and 300 feet back?

A. That was from the rear end of the six cars, not the head end.

Q. You think that was the rear end of the six cars?

A. I testified that the cars were placed back 15 or 20 feet from the frog, that is, the first car, the head car.

Q. And that is where they were when they conducted the test?

A. Yes, sir.

Q. That would bring several of the cars on the level part of the track, would it not?

A. Yes, sir.

Q. And you found then that how many brakes would hold them?

A. One brake.

Q. How long were they allowed to stand there?

A. Possibly 10 minutes.

Q. Had those cars been carefully inspected before you tested them that way?

A. I could not say that.

Q. Had they not, as a matter of fact, been carefully inspected as to their brakes?

A. I could not tell you that.

Q. Who knows about that?

A. The car inspector, I presume.

Q. In 1909 were derails used——

THE COURT: Do not go into that. He did not say anything about derails.

Q. Do you think that that was safe, so far as the operation of the main track is concerned, to leave those cars there with only one brake on?

A. With one brake?

Q. As you did on your test.

A. I do not know what you mean.

Q. Would it be safe to operate the main line down below those cars with those cars standing there continually with just one brake holding them?

A. I would say no.

Re-direct-examination.

By MR. CAMPBELL:

Q. How many brakes would you think it would be safe to put on there to hold those cars?

A. Three.

Q. That would be perfectly safe?

A. It would, yes, sir.

Q. Did you ever hear of any cars getting out of any siding around on the B. & P. Division on a one per cent. grade, or any other per cent. grade, where three cars were braked?

A. No, sir.

PALMER MOSER, having been duly sworn, was examined as follows:

By MR. CAMPBELL:

Q. You were the engineer of the switching crew that handled these ash cars on July 20, 1909?

A. Yes, sir.

Q. Will you tell us, in your own way, what you had to do in order to get those cars out of Albion No. 2, in order to put in two box cars at the end of the siding?

A. I had to pull those cars out of the switch. We had to pull the six cars of cinders out of the switch and set them out on the branch in order to get box cars back to the back end of the switch, and then afterwards took these six cars again and set them in.

Q. When you first went there to get the cars out of Albion No. 2, how were they braked in there? Were the cars braked in there?

A. Yes, sir.

Q. How do you know?

A. I started to pull them and could not.

Q. You started to pull them out and could not?

A. I had a signal to start and pull them out and could not pull them.

Q. What held them?

A. The brakes.

Q. What brakes?

A. Hand brakes.

Q. Did you put any air in those brakes while you were handling them?

A. No, sir.

Q. What kind of brakes were holding them? You say hand brakes?

A. Hand brakes, yes, sir.

(No cross-examination.)

DEFENDANT RESTS.

PLAINTIFF'S REBUTTING EVIDENCE.

JOHN I. RIEGEL, recalled.

By MR. DEMMING:

Q. You heard Mr. Sweeney testify that he worked on the Bloomsburg Division of the D. L. & W. Railroad Company, and that part of the road did not have derailing devices in 1909?

A. I have.

Q. Just tell the Court and jury, according to your own knowledge, whether or not that is so.

MR. CAMPBELL: I object. There was no such statement.

THE COURT: Objection sustained. As I view this case, derailing devices are not in the case at all. That has been adjudicated in the other case. The only question here is whether there was negligence on the part of the crew that put the cars in there in braking them.

MR. DEMMING: Does your Honor rule out of the case any evidence or any argument to the jury as to derailing devices being ordinary and customary in 1909?

THE COURT: Yes. The reason why it was let in in the plaintiff's case was because at that time the question of *res adjudicata* was not before this

Court, and as it appears that the Court above took the view that derailing devices were an extraordinary device, I permitted you to prove that it was an ordinary device. But now they avail themselves of *res adjudicata*, and I decided that it was *res adjudicata* on the statements because, as I viewed the statements, or saw the statement of claims in both cases, it looked to me at that time as though the same fact would be litigated now that was litigated then, and I said it was for that reason *res adjudicata*; but it appears now that there is another fact which I propose to leave to the jury—another question of liability which I propose to leave to the jury under the act under which you are now suing, that did not exist under the law upon which you sued before; and the fact that you did not prove this, that they were usual and ordinary devices the last time, does not help you this time, because on the plea of *res adjudicata* you are bound by what you did prove and what you ought to prove. So that puts that out of the case entirely and the only matter that this jury is to consider is whether or not there was negligence, whether the defendant is liable because of the negligence of these co-employees of the dead man who put those cars in there and braked them in the way they were braked. That is the only question.

MR. DEMMING: Will your Honor grant me an exception?

THE COURT: I will grant you an exception to the offer of testimony. I do not think that this would be rebuttal, but I will grant the exception.

MR. DEMMING: I was going to follow that up by showing by this witness that, as far back at least as 1903, in all the railroad magazines, railroad literature and in textbooks, derailing devices

were known and recognized as customary and usual devices.

THE COURT: As I have said, it is all ruled out and I will give you an exception. I have stated now what I propose to say to the jury in order that you may know just exactly where to put your argument. That is the gist of this case as I view it and as I shall submit it to the jury, and the jury will have to pass on that question.

(Testimony closed.)

(The defendant moves that the Court direct the jury to render a verdict in favor of the defendant.)

(The request is refused and exception noted for the defendant by direction of the Court.)

CHARGE OF THE COURT.

HON. JAMES B. HOLLAND:

Gentlemen of the Jury: In this case Lizzie M. Troxell, administratrix of the estate of Joseph Daniel Troxell, a citizen of the State of New Jersey, brings suit against the Delaware, Lackawanna & Western Railroad Company, a corporation of the State of Pennsylvania, to recover for damages alleged to have resulted to her as administratrix by reason of the death of Joseph Daniel Troxell, who was her husband, and she claims to recover upon her statement of claim filed in this case. This is an action brought, gentlemen of the jury, under what is known as the "Federal Employers' Liability Act", an act which was passed by the Congress of the United States in 1908. There was a previous suit brought by Lizzie M. Troxell, the wife of Joseph Daniel Troxell, deceased, in this court under the Pennsylvania Act which authorizes a widow

to bring suit for herself and her children, not as administratrix, but in her individual capacity, for herself and her children, for the purpose of recovering damages for the death of her husband. In that case, gentlemen of the jury, under the Pennsylvania law, this defendant could not be held liable for any negligence on the part of a fellow workman of Joseph Daniel Troxell, resulting in his injury; in other words, under the Pennsylvania law this defendant could not be held liable if Joseph Daniel Troxell's death was caused by reason of the negligence of another crew working on the same road with him putting those cars in there, because the law of Pennsylvania is that the negligence of a co-employee, negligence of fellow servants with one another that results in another's injury, does not make the railroad company, or the common carrier, liable. So that, under the other suit under Pennsylvania law, even if it had been established that the putting of those cars in there was negligent, the plaintiff could not have recovered upon that ground; but in that suit the plaintiff said she was entitled to recover, under the Pennsylvania law, upon the ground that the Pennsylvania law requires a common carrier or railroad company to have proper and safe machinery, reasonably safe, and to adopt all devices and appliances to make the machinery and roadbed reasonably safe, and that the defendant did not have a derailing device where these cars were put in and, therefore, the defendant was negligent and had violated that principle of liability under the Pennsylvania law. That case was passed on by the Court of Appeals, and the Court of Appeals said that railroad companies are not required to guarantee or insure safety and they are not required to go to extraordinary efforts, in the installment of appliances. They are only required to have such appliances as are reasonably safe, and that there was no law which required them to have derailing devices at every switch, and there was no liability

on account of that. So that you see, gentlemen of the jury, the question of this defendant's liability on account of the derailing switch was, as we say in law, adjudicated, and that is what is meant, as you have heard the arguments, when it is alleged by the defendant that this case is *res adjudicata*; or, at any rate, that feature of it is *res adjudicata*, that is, a thing that has been adjudicated. That question, as to the liability of the railroad company for the injury to Joseph Daniel Troxell by reason of a failure to put a derailing switch there, has been adjudicated by a jury and Courts here, and it has been determined that they are not obliged to have a derailing switch at every place and that there is no liability on account of that, and, therefore, gentlemen of the jury, you will not take that into consideration at all; and you see that that is only fair and reasonable, because we do not want to adjudicate the same fact a number of times. When one jury and a Court pass upon a question and determine it, it is the law that it cannot be brought before another Court and jury, and that is right, because if it was not, we never would end litigation. I have gone into this explanation simply to show you what we mean by the argument of *res adjudicata* as to some of the matters that got into this case. But, as I said to you, under the Pennsylvania law, the question of the negligence of the crew that threw those ash cars in there and braked them and blocked them, was out of the other case, because, under the Pennsylvania law, even admitting that the crew did it negligently, the railroad company would not be liable, because the law in Pennsylvania, under that statute, is that the negligence of a fellow workman on a railroad—or, to put it in this case, the fellow crews on a railroad—the negligence of fellow crews on a railroad does not make a railroad company liable for injury resulting. If one crew negligently injures another, under that Pennsylvania law as it stood, the company is not li-

able. But Congress, I say, enacted this National or Federal law in 1908, known as the "Employer's Liability Act", and, in that act, they said that "every common carrier by rail, while engaged in commerce between any of the several States or territories, shall be liable in damage to any person suffering injury while he is employed by such carrier in such commerce, or in case of death of such employee, for such injury or death resulting, in whole or in part, from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, etc." Now you see, as I say, the question of defects in cars, engines and rails has been adjudicated in the other case, so that it is out of this case; but you will notice by this act, if the injury results to an employee by reason of the negligence of another employee, the railroad company, or the common carrier engaged in interstate commerce, is liable for the negligence of that other employee. In other words, under this act if that crew was negligent in braking and blocking those cars on the siding, and it injured Troxell and killed Troxell, under this act the railroad company would be liable. I think you catch the distinction.

Now that is the only question in this case, whether or not the defendant was negligent, through its employees and the crew that put those ash cars on that track, in not braking them and blocking them to prevent them from running out on the main track, as they did, and caused the death of Joseph Daniel Troxell. There is no dispute about the fact that, on the 21st of July, 1909, sometime near eight o'clock, some distance north of Belfast, these ash cars struck the engine upon which the decedent was a fireman and caused his death. There is no doubt about the fact that they had run away from the switch No. 2, at the Pen Argyl branch of the road, and had run out on to the main track and run down this distance, almost to Belfast, when they

struck this engine. It appears that this piece of road running up to Portland has a branch off into Pen Argyl, and on the right of it there is a switch going off, switch No. 2, going off to the right of this Pen Argyl branch; that the first 100 feet of it are about level and then the next section of it is about a half per cent. grade to the hundred, and then there is about one per cent. grade to the hundred. It then appears that there were six ash cars thrown in on this branch two days before; one day before they were taken out and two box cars put behind them. They were again put back and they were run back some distance from the point of the switch, so that it is claimed by the plaintiff they were on this portion of the switch where there is a grade of one per cent. to the hundred. It appears from both sides that these cars were braked and blocked. That is conceded and undisputed, but the plaintiff and the defendant at this point differ as to whether they were braked and blocked carefully. The plaintiff alleges that they were carelessly braked and blocked. The defendant alleges that they were properly braked and blocked and that they were so braked and blocked, carefully braked and blocked, that they could not have escaped had they not been tampered with by some person illegally and without authority, and for that they are not responsible. I may say that, if it be true that these cars were properly and safely braked and blocked by the employees of this railroad company and somebody tampered with those brakes and let those cars out, the railroad company is not liable, because they cannot provide against illegal or criminal acts on the part of trespassers, and it has been time and time and again held, and for good reason, that the railroad companies are not liable for any injury which may result from cars running away because of the illegal acts of trespassers. But the plaintiff says that they have established, by circumstantial evidence, that these cars were negligently braked and blocked, and that they

ran away, not because of any tampering with them by trespassers, but because they were negligently braked and blocked. That the defendant denies. The evidence upon which the plaintiff relies to establish that, or, the witnesses they have called, are as follows: Mr. Riegel, who is an expert, or who has been an engineer for a great many years for a great number of roads, has had a varied experience, and you heard him testify; and he testified to you as to the uncertainty of brakes, under any conditions, under the circumstances under which these brakes were applied. He testified that the putting on of brakes when cars stood still was not always a true test that they were holding, and he gave some other testimony, and you will recall what he said about that. The plaintiff also alleges, and they have called a witness who says that he passed there and saw one block under the wheels, that he saw that block the night before the cars ran away, about five o'clock, and saw it on the morning of the 21st, the day the cars ran away, and he tells you how it was at both times. I might remark here that Mr. Grupe also testified that the only blocks he saw was one. However, there is other evidence to the effect that there was more than one block; there was one conductor who testified there were two, that he put them under himself. Mr. Parsons testified that he passed there; the Parsons have a quarry nearby, and he testified that he passed there the morning before and that a block about from 2 to 4 feet one way, in length, and 3 by 6 inches, was under the wheel of the front car; that it was about quarter way cut through the night before and he said the next morning when he went by there it was about three-quarters way cut through (p. 99). "Q. Had you seen these cars before that, the afternoon before? A. On the afternoon before, yes, sir. Q. Had you noticed the position of the block then? A. The impression in the block was not as deep as it was in the morning. Q. Just tell the Court and jury what it was you noticed

about a quarter of seven on the morning that they ran away. A. I noticed that the stick that they had under the cars to block the cars with, was almost cut in two. That is the only thing that I noticed. Q. How far through that block had the wheels cut? A. I cannot be so positive, but I should judge about three-quarters of the way, perhaps more." Then on cross-examination he said: "It was a block about—well, between 2 and 4 feet long—I won't be positive to the length—and about 3 by 6. Q. Was it a square block? A. 3 by 6—yes, square block. Q. Had you ever seen it before? A. Not that I know of. Q. Was it there in the morning, that same morning? A. The same morning, yes, sir. Q. I do not mean the morning of the accident now, but the morning of the previous day. A. No, I will not say anything about that. I am not positive about that. I did not notice it. * * * I passed right close by it, within about 10 feet of it, and I noticed the block and that the wheel had cut into it, and the impression was just simply into my mind that the brakes was not on and that was put there to keep the cars there. Q. Did you ever pass this siding when there were cars on here before? A. I have, yes, lots of times."

Now that is what he said about that block. The material part of it is that the night before there was only about an inch of it cut and in the morning it was cut about three-quarters of the way through. Then the plaintiff has also called two other witnesses in addition to this same witness, who testify that from where they were, from seven o'clock until the cars ran away, they saw nobody about there to interfere with the cars, and that is their evidence. Their expert and these witnesses who say that they saw nobody about there that morning and the fact that that stick was only indented about a quarter of the way the night before and indented three-quarters of the way at quarter of seven the next morning—that is the evidence, I say, upon which the plaintiff asks you to draw the

inference that these brakes were defective in some manner, or defectively applied and not properly applied and that the cars were not properly blocked and braked and that this crew that put them in there, putting them on this one per cent. grade, did it negligently and they say that these facts, notwithstanding the testimony as to what was done, is sufficient for you to draw the inference that they are mistaken about how they did it, and that they did it negligently, which makes the defendant liable. That is the plaintiff's case.

The defendant calls the men who put the brakes on and put the blocks there. They called the conductor and called the brakeman, and they say they double braked—that is, two men pulled on the wheel—five of those cars, and the conductor says he put, himself, two blocks under the cars, one under the front car and one under the next to the front car, and he kicked them under with his foot. You will recollect what he said about it. They say, with the brakes double braked, as these men say they put them on, with these two blocks under there, that they were safely blocked and that they could not have gotten away; that they were properly braked and blocked and would not have escaped had they not been tampered with, and that this is positive testimony to establish their theory of it, that there was no negligence committed, and that you ought to find from their testimony that the cars escaped, not because of any negligence in putting them in, but must have escaped because of some other unexplained reason, for which they are not liable, and they say they are not liable if this escape is unexplained. That is true. If the plaintiff has failed to establish that they were negligently blocked and braked, then the plaintiff has no case. If it is unexplained how it came that they got away, there is no liability on the part of the defendant. Then the question for you, you see, from the evidence as submitted by both sides, is: did this crew

negligently block and brake those six cars? If you find from the evidence that they did, the plaintiff then would be entitled to recover. If you find from the evidence that the crew did commit no negligent act, but that it is unexplained how it came that they got away, then the defendant is not liable.

Now if you find that the crew was negligent in braking and blocking the cars, and that the defendant is liable, you will pass to the next question, as to what compensation or what damages this plaintiff ought to have. She is the administratrix and, in that capacity, has instituted suit for the death of her husband. You have heard the testimony as to the age and the habits and the kind of a man the decedent, Joseph Daniel Troxell, was. You must take into consideration all those things; his age, his physique, his earning capacities, whether good or bad; whether he was economical and saving as to his wages, because this plaintiff can only recover for the amount of damages she sustained. What would he give her? If he was a man who spent and squandered his money and gave her nothing, then she lost nothing; but, if he gave her large sums of money monthly and yearly, she lost just what she would be deprived of by his death, and you will take, as I say, all those matters of his age, habits, and earning capacity, into consideration. Also you will say how long a man of his age would live, and how long she would live to enjoy this earning capacity. You are not to speculate on how much he would have made in the future, or whether he would not have made as much. You are to judge his earning capacity by what he was earning when he was killed. We cannot go into any speculations of what he would be in the future, whether he would be a greater earner or a less earner. We take the figures as they are; that is the best we can do. He might be a greater earner or might be less, but we cannot speculate. Then, after you have ascertained his earning capacity, you will ascertain from

the evidence how much of those earnings she got monthly or yearly; what sums she got yearly from him—monthly and then yearly; her yearly income from his earnings. Then you will give her, if she is entitled to anything, such a sum as, during his life and her life as man and wife, would be sufficient to enable her to get that much yearly until she died. That is the calculation you are to make in order to ascertain what sum she is entitled to as damages in this case. That is the rule in the case of an administratrix recovering for herself and children under this law. Have you a case, Mr. Demming, to establish that the plaintiff is entitled to funeral expenses?

MR. DEMMING: No, sir, there is no decision, of course, under the Federal law on that point, as it is too recent.

THE COURT: Under the Pennsylvania law?

MR. DEMMING: Under the Pennsylvania law she is.

THE COURT: They have presented a bill for funeral expenses. You will take that into consideration also and, in addition to the amount I say she would be entitled to, she would be entitled to recover funeral expenses in this case.

Now, gentlemen of the jury, the defendant asks me to charge you that, under all the evidence, the verdict must be for the defendant. This is refused and an exception granted for the defendant. You will pass upon the question as I have submitted it and render your verdict accordingly.

MR. CAMPBELL: Before the jury retires, I should like to place on the record my reasons for asking binding instructions. My reasons are:

1. That the Federal Employer's Act of April 22, 1908, is unconstitutional.

2. That the submission in this case to the jury is

that employees engaged in intrastate commerce caused the injury, and that such negligence does not come under the terms of the act.

3. That the uncontradicted evidence on both sides shows no negligence on the part of the defendant company.

MR. DEMMING: Your Honor will grant me an exception to that part of the charge referring to the derailling device, ruling that out?

THE COURT: Yes.

(Exception noted for plaintiff as requested.)

The jury rendered a verdict for the plaintiff for \$10,196.50.

And thereupon, the counsel for the said defendant did then and there except to the aforesaid charge and opinion of the said Court, and inasmuch as the said charge and opinion, so excepted to, do not appear upon the Record:

The said counsel for the said defendant did then and there tender this Bill of Exceptions to the opinion of the said Court, and requested the seal of the Judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid Judge at the request of the said counsel for the defendant did put his seal to this Bill of Exceptions, pursuant to the aforesaid statute in such case made and provided, this first day of April, 1912.

JAMES B. HOLLAND, (L. S.)

CERTIFICATE.

The foregoing notes of testimony, with the exceptions taken by counsel during the trial to the rejection or admission thereof, and the charge with the exceptions thereto, have been examined by me, and are hereby certified, approved, and ordered filed, so as to become part of the record.

JAMES B. HOLLAND,
Judge.

JURY.

And now, to wit, this 13th day of November, 1911, a jury being called come, to wit:

Walter S. Dowlin,	F. J. Mullahy,
Jonas F. Kern,	Eduard Norris,
George R. Schuchardt,	Jacob S. Ulmer,
John T. Emlen,	Cyrus Oberly,
Eduard W. Alexander,	Louis C. Lawton,
Nicholas Wagner,	Samuel Mason,

who were duly sworn, &c., to try the issue joined.

VERDICT.

And afterwards, to wit, on the 16th day of November, 1911, the jurors aforesaid upon their oaths and affirmations respectively do say that they find for plaintiff and assess the damages at Ten thousand one hundred and ninety-six 50/100 Dollars.

**MOTION FOR JUDGMENT NON OBSTANTE
VEREDICTO.**

Filed Nov. 20, 1911.

And now, November 18, 1911, the defendant, by its attorney, James F. Campbell, moves the Court to have

all the evidence taken upon the trial duly certified and filed so as to become part of the record, and for judgment *non obstante veredicto* upon the whole record.

At the trial the following point, with binding instructions, was refused:

(Record page 295):

"The defendant moves that the Court direct the jury to render a verdict in favor of the defendant.

The request is refused and exception noted for the defendant by direction of the Court."

D. B. REESE,
J. H. OLIVER,
JAS. F. CAMPBELL,
Attorneys for Defendant.

**OPINION ON MOTIONS FOR JUDGMENT NON
OBSTANTE VEREDICTO AND FOR A NEW
TRIAL.**

Filed March 29, 1912.

HOLLAND, D. J.

Passing by the other four reasons assigned for judgment *non obstante veredicto*, we come first to the question as to whether the case was *res adjudicata*, and second, whether the plaintiff produced sufficient evidence of negligence to take the case to the jury.

The view the Court took of both these questions at the trial fully appears in the charge. Upon a re-examination of the case we see no reason to change our view. The motion is therefore refused.

There are a number of reasons assigned for a new trial, all either to the admission or rejection of evi-

dence, none of which we deem it necessary to discuss. The evidence as to the derailing devices was not submitted to the jury, and the admission of the evidence of experts we think was properly admitted.

The motion for a new trial is overruled.

**EXCEPTION TO REFUSAL OF THE COURT TO
ENTER JUDGMENT FOR DEFENDANT NON
OBSTANTE VEREDICTO.**

Filed Apr. 1, 1912.

And now, this 1st day of April, A. D. 1912, on motion of James F. Campbell, attorney for defendant, the Court grants to the defendant an exception to the action of the Court in refusing to enter judgment *non obstante veredicto* upon the whole record in the above cause.

BY THE COURT.

JAMES B. HOLLAND,
D. J.

PRAECIPE FOR JUDGMENT.

Filed Apr. 1, 1912.

Sir:

Enter judgment on the verdict rendered in the above-entitled case in favor of the plaintiff and against the defendant.

GEORGE DEMMING,
Attorney pro Plaintiff,
March 30, 1912.

To the Clerk,
United States District Court,
Eastern District of Pennsylvania.

JUDGMENT.

Filed Apr. 1, 1912.

Before HOLLAND, J.

And now, this 1st day of April, 1912, in accordance with praecipe filed, judgment is hereby entered on the verdict in the above-entitled case in favor of the plaintiff and against the defendant in the sum of Ten thousand one hundred and ninety-six 50/100 (\$10,196.50) Dollars.

Attest:

LEO A. LULLY,
Deputy Clerk.**ASSIGNMENTS OF ERROR.**

Filed Apr. 4, 1912.

(1) The learned Judge erred in overruling defendant's motion, as follows:

(Record page 12):

"Mr. Campbell: If your Honor please, before the jury is sworn, I desire to make a motion and have it put upon the record.

As this case is not at issue I formally object to a trial of the case now.

(Motion objected to.)

(Motion overruled.)

(Exception noted for defendant by direction of the Court.)"

(2) The learned Judge erred in refusing defendant's offer, as follows:

(Record page 13):

"Mr. Campbell: I offer in evidence the rec-

ord of the previous trial of the case of Lizzie M. Troxell, a resident of the State of New Jersey, versus the Delaware, Lackawanna and Western Railroad Company, a corporation organized under the laws of the State of Pennsylvania, April Sessions, 1909, No. 694, in which there was a verdict in this court and a reversal in the Circuit Court of Appeals, and I object to the trial of this case because this proceeding has already been adjudicated.

(Objected to.)

(Objection sustained.)

(Exception noted for defendant by direction of the Court.)"

(3) The learned Judge erred in refusing to dismiss the action, as follows:

(Record pages 13-14):

"Mr. Campbell: If the Court please, I also move for the dismissal of this cause for the reason that Lizzie M. Troxell as the widow of Joseph Daniel Troxell brought a case against this defendant and proved that at the time he was engaged in both intrastate and interstate traffic, and your Honor held in an opinion in that case that there was a concurrent remedy, that is, the widow could proceed in a case of that kind under the state law or the administratrix could sue under the Federal Employers' Liability Act, and for that reason, the widow having lost her action under the state law, she is concluded from bringing an action as administratrix, and I ask that this present case be dismissed on that ground.

The Court: There is not any evidence of that yet.

Mr. Campbell: The record shows it.

The Court: The record is not in.

(Motion objected to.)

(Motion overruled.)

(Exception noted for defendant by direction of the Court.)"

(4) The learned Judge erred in allowing the plaintiff to prove the funeral expenses of decedent, as follows:

(Record page 17):

"The Court: The expense of burying him?

Mr. Demming: Yes. His funeral expenses.

The Court: You may proceed.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)"

(5) The learned Judge erred in allowing plaintiff to prove the absence of a derailing device at Albion siding No. 2, as follows:

(Record page 44.)

"The Court: What did the Court of Appeals say about these derailing switches?

Mr. Demming: They did not touch on it at all. Nothing was said about it.

Mr. Campbell: The Court of Appeals said that derailing devices were not in the case at all.

The Court: Do you propose to prove that at the time these cars ran away there was a derailing switch at the West Albion siding?

Mr. Demming: Yes, sir.

The Court: The objection is overruled.

(Exception noted for defendant by direction of the Court.)"

(6) The learned Judge erred in still allowing Witness Grupe to testify as to derailing devices, as follows:

(Record page 45):

"Mr. Campbell: If the Court please, as a fur-

ther objection to this gentleman testifying, he is not qualified as an engineer about grades. There is no evidence here as to what the West Albion siding was used for, the purpose, or anything else. I state that as a further reason for my objection, to go upon the record.

The Court: The objection is overruled.

(Exception noted for defendant by direction of the Court.)"

(7) The learned Judge erred in still persisting in allowing plaintiff's witnesses to testify as to derailing devices on the different sidings, as follows:

(Record page 46):

"Q. What sidings there are used or at the time of the accident were used for the storage of cars, for cars to stand?

Mr. Campbell: I object to that, as it has nothing at all to do with this case. Please state the purpose of your offer.

Mr. Demming: My offer is to show that both West Albion siding and Albion siding No. 2 were used for the storage of cars, and but one of these sidings were equipped with derailing devices.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)"

(8) The learned Judge erred in still allowing plaintiff's witnesses to testify about derailing devices, as follows:

(Record page 53):

"Q. When was the derailing switch put in on West Albion siding?

A. That I don't know.

Q. About how long before the accident?

Mr. Campbell: I object to anything about the derailing devices on West Albion siding.

The Court: That having been admitted before, the objection is overruled.

(Exception noted for defendant by direction of the Court.)"

(9) The learned Judge erred in refusing to strike out all of the testimony previously given in reference to derailing devices, as follows:

(Record page 54):

"Mr. Campbell: If the Court please, before I cross-examine, I move to strike out all this witness has said about derailing devices upon West Albion switch, or any other switches, for the reason that the Court of Appeals has already decided that the derailing device, as far as we have gone, is not a factor in this case.

Mr. Demming: I object to that, for this reason, that I shall follow this testimony up, of course, with testimony showing that these devices are absolutely necessary under conditions such as existed here, that they are not new fangled devices, but that they are old, customary and ordinary devices used on all railroads, and have been for many years back.

The Court: The motion is overruled, and an exception noted for defendant.

(Exception noted for defendant by direction of the Court.)"

(10) The learned Judge erred in overruling defendant's objection to the following question:

(Record page 85).

"Q. Is or is there not frequent blasting in all those quarries about there?"

(Objected to.)

Mr. Campbell: What is the purpose of proving that there were explosions in the quarries there?

Mr. Demming: I want to prove that there is frequent blasting in these quarries and that this blasting causes vibration, necessarily.

Mr. Campbell: I object to that. He does not say anything about that in his statement of claim.

The Court: That does not make any difference.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)"

(11) The learned Judge erred in allowing Witness Weeks to testify as to derailing devices, as follows:

(Record pages 112, 113, 114, 115):

"Q. How are they used and where?

Mr. Campbell: I object to this. It is already ruled that the derailment switch is not a factor here, and now we are going into what they are used for in Mr. Weeks' experience on other railroads. That is not relevant.

Mr. Demming: I will make the following offer of proof:

Counsel for plaintiff offers to prove by this witness, and by the following witness, also a very capable and experienced engineer, that derailing devices, or derailing switches, as they are called, are not new-fangled, extraordinary or very late inventions, but have been in use by all properly equipped railroads for from 15 to 20 years back, and that the customary and ordinary practice at the time that this accident happened, on all railroads, was to have so equipped with a derailing device, or a derailing switch, every siding approaching the main line, or leading to the main line, on a down grade. In addition to the above, plaintiff's counsel also, while conceding that there is no Federal statute at the present time touching upon or calling on railroads to install derailing

devices, wishes by this offer to prove, notwithstanding this, that the absence of such a derailing device and the failure to use such a derailing device, under circumstances such as appear in this case, on a siding leading on a down grade to the main line, is ordinary negligence and that the defendant railroad company, failing to have had such a device installed on this siding, although it had other sidings of practically the same nature and practically the same grade in the immediate vicinity equipped with these derailing devices at the time of the accident, was guilty of ordinary negligence.

Mr. Campbell: I object on the ground that the offer is too large in its scope; second, the question of the derailing device has been passed upon by the Court of Appeals in this Circuit, holding that the derailing device under such circumstances is not necessary, and thirdly, it leaves out the question of alternative devices taking the place of derailing devices.

Mr. Demming: Counsel for plaintiff, in reply to the objection of counsel for defendant, offers to show that there was not in the engineering practice on railroads at the time of this accident, any alternative device to a derailing switch, but that it is the only device known to the engineering practice that will prevent such an accident as here occurred.

(Objected to.)

The Court: The decision in the Court of Appeals was that the mere absence of a derailing switch furnished no evidence of negligence; but this was put upon the principle, enunciated by Justice Lamar in the Washington Railroad case, 153 U. S. 554, invoking the rule that a railroad company is not bound to insure the absolute safety of the machinery or mechanical appliances which

they provide for the use of the employees, nor are they bound to supply the best and safest or newer of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. In other words, the Court put it upon the ground that the want of a derailing switch was no evidence of negligence, because the railroad company is not required to use absolutely safe machinery; and now the plaintiff offers to show that this is a device that does not come within the application of the rule, that this is an ordinary device, used by all railroads everywhere where there is a similar situation of grade, and that, being the ordinary appliance, the failure to use it here is negligence.

Mr. Campbell: Before your ruling, your Honor, that is not the exact question. Any engineer or any practical man will say that, if you furnish something to take the place of a derailing device, that is just as good, that is sufficient. Now, as I said when I argued the motion for a new trial in the other case here, suppose we had built a stone wall in front of those cars; the mere absence of the derailing device beyond that would not make a particle of difference, and so the Court of Appeals said here. The testimony in this case so far is uncontradicted that those cars could not have been moved away, by his own witness and why? Because they were braked and blocked in there. If they could not possibly have moved away, what on earth is the use of a derailing device?

The Court: I will not make any comment on that just now, as to the uncontradicted evidence.

What I was about to say was that I would permit the plaintiff to prove that derailing devices are not an extraordinary device, but one, as he says he can prove, of the ordinary appliances for the general safety of employees, and that it comes within the rule that it is required to make railroading reasonably safe and stable.

Mr. Campbell: If he can prove that; but, even if there was a statute providing for a safety device on all railroads, it would not make any difference in this case.

The Court: The decision is that the railroad company is required to use the ordinary, reasonable devices known to railroading, but it is not required to discover new ones and to guarantee absolute safety by its devices. But it is required to use the ordinary devices which will make railroading reasonably safe, and he offers to prove that he can bring this device within that class of devices. If plaintiff's counsel can do that, I will let him do it, and I do not think it is at all in conflict with the decision of the Court of Appeals. The objection is overruled and the plaintiff will be permitted to offer evidence in accordance with that ruling.

(Exception noted for defendant by direction of the Court.)"

(12) The learned Judge erred in overruling defendant's objection to the following question:

(Record page 117):

"Q. On July 21, 1909, what was the ordinary and customary practice on railroads with regard to installing derailing devices on a siding approaching a main line on a down grade?

(Objected to. The witness has not qualified, and said he had nothing to do with railroads for some years prior to July 21, 1909; also as leading.)

By the Court: How long have you been there?

A. I have been railroading since 1886, and of course while I have not been actively in practice and in the employ of any steam railroad, I use the steam railroads a good deal, and I am building interurban roads.

Q. Steam railroads?

A. No, electric roads.

Q. How long has it been since you know anything about constructing steam roads?

A. I have not lost touch of them, and I have not lost my power of observation. I know just as much about the practice in steam roads now as if I was actively at work on them, probably a good deal more, because I have an opportunity for a good deal wider observation.

(Objection overruled. Exception for defendant.)

(Question repeated.)

A. The ordinary practice was to put in a derailling switch."

(13) The learned Judge erred in overruling defendant's objection to the following question:

(Record page 118):

"Q. What is the cost of it? (Derailing devices.)

(Objected to.)

The Court: That may be a material question, to submit evidence to show the cost, because a railroad is not required, as a general practice, to go to extraordinary costs in installing individual machinery, but if it can be shown that the machinery or devices are of the ordinary and reasonable kind, it is a matter to be inquired into.

(Objection overruled. Exception for defendant.)"

(14) The learned Judge erred in refusing to strike

out all of Witness Weeks' testimony as to derailing devices, as follows:

(Record page 129):

"Mr. Campbell: I move to strike out all of Mr. Weeks' testimony about these derailing devices, inasmuch as Mr. Demming has not come up to his offer.

Mr. Demming: Objected to, because I have come up to my offer as to the customary and ordinary devices at the time of the accident.

(Motion overruled. Exception to defendant.)"

(15) The learned Judge erred in overruling defendant's objection to the following question:

(Record page 135):

"Q. On July 21, 1909, the day of this accident, what was the ordinary and customary practice on railroads with regard to sidings approaching or leading to the main line on a down grade?

(Objected to as leading and stating a conclusion and calling for testimony that this witness is not competent to give, because he has only been employed by several railroad companies.)

(Objection overruled. Exception for defendant.)"

(16) The learned Judge erred in allowing Witness Riegel to testify as an expert upon brakes, as follows:

(Record page 147):

"By Mr. Demming: In regard to your qualifications, you testified about brakes. Have you made a study of brakes at any time?

Mr. Campbell: Objected to. That was all gone into yesterday fully. I object to any re-direct-examination upon the point.

Mr. Demming: Do you still object to his qualification?

Mr. Campbell: Yes, sir.

The Court: I think he is qualified to answer any question about brakes.

(Exception noted for defendant by direction of the Court.)"

(17) The learned Judge erred in still allowing Witness Riegel to testify as follows:

(Record pages 151-152):

"Q. You say all cars built in 1909 at the company's shops and the American Car Wheel Works and all the car company works all over the country are the same standard?

A. They are not.

(Objected to.)

The Witness: Sixty thousand pounds capacity, the cars on the Lackawanna are of this standard.

The Court: Are of the standard with which you are acquainted?

A. They are.

Mr. Demming: The old standard was only forty thousand?

A. Or less. Cars of less capacity than that are inefficient. They are no longer in service.

The Court: You know how the sixty thousand pound cars were equipped?

A. I do.

The Court: The testimony is these were sixty thousand.

Mr. Campbell: I object because there is no testimony that these cars were sixty thousand pounds capacity. As a matter of fact they were not.

The Witness: I heard testimony yesterday they were.

The Court: Go on with your questions.

(Exception noted for defendant by direction of the Court.)"

(18) The learned Judge erred in allowing Witness Riegel to testify about brakes, as follows:

(Record page 152):

"By Mr. Demming:

Q. Tell us the braking apparatus on that car, that kind of car.

Mr. Campbell: Which kind of car is that?

By Mr. Demming:

Q. The kind of car you heard described here as being these six cars that ran away.

Mr. Campbell: Objected to because there is no description they were gondola cars.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)"

(19) The learned Judge erred in refusing to strike out the testimony of Witness Riegel concerning brakes, which testimony was as follows:

(Record pages 154, 155, 156).

"Q. Tell us whether or not, when the brake is put on, as the term is, hard, that is, the wheel turned as far as it will go, whether or not that absolutely signifies or shows that the brake is really on the car?

A. There is no assurance that it is applied.

Q. Why?

A. The chain may have too much slack, and may bind around the brake staff. There may be false motion in some of the rods.

Mr. Campbell: I object to the answer and ask that it be stricken out.

The Court: This does not amount to anything unless you show that there was a binding of the brake band or something of that kind.

Mr. Demming: The testimony is here, and will be further, I have no doubt, that these brakes were put on hard. That is a high sounding term merely and means nothing.

I want to show by this witness that while a brake may seem to be put on hard, there are so many conditions entering into that brake, and the different parts of that brake, that the brake really, that is the shoe, may not really be tight against the rim of the wheel, and hold the wheel, or if it is tight it may be tight only under such conditions as will allow it afterwards to slacken off, even if that brake was put on, as the railroad men term it, hard.

Mr. Campbell: I ask that all the testimony on that line be stricken out unless they identify these cars.

Mr. Demming: I intend to follow that testimony up by showing by this man, as a competent engineer, an engineer of some experience on this particular road, upon other roads, that according to their experience when cars are put on a siding such as this, approaching the main line, on a down grade, although the brakes are put on hard, it is not safe to allow those cars to stay in that position for this very reason; there are so many conditions entering into these brakes that although the brakes are put on hard, that in itself does not signify those cars are going to stay there. That is based upon the experience of these engineers, and upon their construction of railroads in 1909.

Mr. Campbell: I object.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)"

(20) The learned Judge erred in allowing Witness Biegel to testify still further concerning brakes, as follows:

(Record page 161):

"A. In winding up the chain the chain may lap falsely over one link or another, and in stand-

ing, some slight change in temperature, will either slip out, so as to release, or it will sag and drop.

Q. That is even when the brake is in perfect condition?

A. It is. Not absolutely perfect, but what is known as an efficient brake. The chain, in that instance, might be too long or the links might be too large in diameter. Then the car may be so placed that the journals are not absolutely in their centre bearings.

Mr. Campbell: I object to this testimony.

By the Court:

Q. Are these matters you are relating, matters that in your experience as a railroad man have been a basis or a reason why cars run away?

A. They are.

Q. Really have been, upon experience, so found to have existed under certain conditions?

A. They are, and have been threshed out scores of times.

The Court: The objection is overruled.

(Exception noted for defendant by direction of the Court.)"

(21) The learned Judge erred in allowing Witness Riegel to testify concerning the possible effect of blasting upon the brakes and their efficiency, as follows:

(Record page 166):

"By Mr. Demming:

Q. Would the vibration of blasting be a condition entering into whether or not brakes put on hard would hold cars?

Mr. Campbell: Objected to in the present state of the record, as the gentleman has not qualified.

By the Court:

Q. Do you know whether blasting would affect brakes on a car nearby?

A. I do know of instances where a man braked his car—this happened to be in the mines—braked his car—

The Court: Objection overruled.

(Exception noted for defendant by direction of the Court.)"

(22) The learned Judge erred in allowing Witness Riegel to testify still further concerning blasting and its effect upon the efficiency of brakes, as follows:

(Record page 168):

"Q. You have not known of any cars or brakes being affected by blasts or explosions in slate quarries. You have said that?

A. I have said it.

Mr. Campbell: I object to the gentleman testifying on this question.

By Mr. Demming:

Q. The vibration of blasting is a condition entering into it?

(Objected to.)

A. Vibration is an element. If brakes are as long as they are in cars—

Mr. Campbell: I object to that question and answer and ask that it be stricken out.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)"

(23) The learned Judge erred in allowing Witness Riegel to testify concerning the possible effect of a derailment upon the brakes of the cars, as follows:

(Record pages 168-169):

"By Mr. Demming:

Q. It has been testified here, after this derailment of a car on the train on Monday the 19th of July, three of the cars were taken out of the train, and three cars immediately in front of the

car that was derailed, and put upon this siding, in connection with three other cars that were found standing on West Albion siding, and no inspection were made of their brakes, of the three cars taken out of the train. Would or would not that derailment, with the train going eight miles an hour, as has been testified at the time the derauling occurred, have any effect upon the brakes on those three cars?

(Objected to as leading.)

By Mr. Demming:

Q. Would it have any effect?

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)"

(24) The learned Judge erred in admitting in evidence certain photographs, as follows:

(Record page 202):

"Mr. Demming: I offer in evidence the two photographs of derauling devices which have been identified by Mr. Riegel; and the drawings of the brake apparatus.

Mr. Campbell: I object to the admission in evidence of the drawings of the brake apparatus as not proper under the circumstances.

The Court: We will admit the photographs and the drawings.

(Exception for defendant noted by direction of the Court.)"

(25) The learned Judge erred in refusing to permit Witness Quintus Buch to answer the following question:

(Record page 223):

"By Mr. Campbell:

Q. Could those cars have got away from that siding, the way you and the rear brakeman had braked them?

(Objected to.)

(Objection sustained.)

(Exception noted for defendant by direction of the Court.)"

(25) The learned Judge erred in refusing to permit Witness Ruch to answer the following question:

(Record page 223):

"Q. What reason can you assign for these cars getting away?

(Objected to.)

(Objection sustained.)

(Exception noted for defendant by direction of the Court.)"

(26) The learned Judge erred in refusing to permit Witness Ruch to answer the following question:

(Record page 224):

"By Mr. Campbell:

Q. If these cars were in the same condition as to brakes and blocks at the time they went out, I mean as you had left them, could they have gone out?

(Objected to.)

(Objection sustained.)

(Exception noted for defendant by direction of the Court.)"

(27) The learned Judge erred in allowing Witness William Sweeney to answer a question concerning derailing devices, as follows:

(Record page 240):

"Q. Were they not customary and ordinary devices in 1909 on railroads?

Mr. Campbell: Objected to as stating a conclusion.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)"

(28) The learned Judge erred in his charge to the jury, when he said:

(Record page 296).

"In that case, gentlemen of the jury, under the Pennsylvania law, this defendant could not be held liable for any negligence on the part of a fellow workman of Joseph Daniel Troxell, resulting in his injury; in other words, under the Pennsylvania law this defendant could not be held liable if Joseph Daniel Troxell's death was caused by reason of the negligence of another crew working on the same road with him putting those cars in there, because the law of Pennsylvania is that the negligence of a co-employee, negligence of fellow servants with another that results in another's injury, does not make the railroad company, or the common carrier, liable. So that, under the other suit under Pennsylvania law, even if it had been established that the putting of those cars in there was negligent, the plaintiff could not have recovered upon that ground; but in that suit the plaintiff said she was entitled to recover, under the Pennsylvania law, upon the ground that the Pennsylvania law requires a common carrier or railroad company to have proper and safe machinery, reasonably safe, and to adopt all devices and appliances to make the machinery and road bed reasonably safe, and that the defendant did not have a derailing device where these cars were put in and, therefore, the defendant was negligent and had violated that principle of liability under the Pennsylvania law."

• (29) The learned Judge erred in his charge to the jury, when he said:

(Record pages 296-297):

"That case was passed on by the Court of Appeals, and the Court of Appeals said that rail-

road companies are not required to guarantee or insure safety and they are not required to go to extraordinary efforts, in the installment of appliances. They are only required to have such appliances as are reasonably safe, and that there was no law which required them to have derailing devices at every switch, and there was no liability on account of that. So that you see, gentlemen of the jury, the question of this defendant's liability on account of the derailing switch was, as we say in law, adjudicated, and that is what is meant, as you have heard the arguments, when it is alleged by the defendant that this case is *res adjudicata*; or, at any rate, that feature of it is *res adjudicata*, that is, a thing that has been adjudicated. That question, as to the liability of the railroad company for the injury to Joseph Daniel Troxell by reason of a failure to put a derailing switch there, has been adjudicated by a jury and Courts here, and it has been determined that they are not obliged to have a derailing switch at every place and that there is no liability on account of that, and, therefore, gentlemen of the jury, you will not take that into consideration at all; and you see that that is only fair and reasonable, because we do not want to adjudicate the same fact a number of times. When one jury and a Court pass upon a question and determine it, it is the law that it cannot be brought before another Court and jury, and that is right, because if it was not, we never would end litigation."

(30) The learned Judge erred in his charge to the jury, when he said:

(Record page 298):

"Now you see, as I say, the question of defects in cars, engines and rails has been adjudicated in the other case, so that it is out of this

case; but you will notice by this act, if the injury results to an employee by reason of the negligence of another employee, the railroad company, or the common carrier engaged in interstate commerce, is liable for the negligence of that other employee. In other words, under this act if that crew was negligent in braking and blocking those cars on the siding, and it injured Troxell and killed Troxell, under this act the railroad company would be liable. I think you catch the distinction."

(31) The learned Judge erred in his charge to the jury, when he said:

(Record page 299):

"But the plaintiff says that they have established, by circumstantial evidence, that these cars were negligently braked and blocked, and that they ran away, not because of any tampering with them by trespassers, but because they were negligently braked and blocked. That the defendant denies."

(32) The learned Judge erred in his charge to the jury, when he said:

(Record pages 302-303):

"Then the question for you, you see, from the evidence as submitted by both sides, is: did this crew negligently block and brake those six cars? If you find from the evidence that they did, the plaintiff then would be entitled to recover. If you find from the evidence that the crew did commit no negligent act, but that it is unexplained how it came that they got away, then the defendant is not liable."

(33) The learned Judge erred in his charge to the jury, when he said:

(Record page 304):

"The Court: They have presented a bill for Funeral expenses. You will take that into consideration also and, in addition to the amount I say she would be entitled to, she would be entitled to recover funeral expenses in this case."

(34) The learned Judge erred in his charge to the jury, when he said:

(Record page 304):

"Now, gentlemen of the jury, the defendant asks me to charge you that, under all the evidence, the verdict must be for the defendant. This is refused and an exception granted for the defendant. You will pass upon the question as I have submitted it and render your verdict accordingly."

(35) The learned Judge erred in refusing to grant defendant's motion for judgment *non obstante veredicto*, as follows:

"And now, November 18, 1911, the defendant, by its attorney, James F. Campbell, moves the Court to have all the evidence taken at the trial duly certified and filed so as to become part of the record and for judgment *non obstante veredicto* upon the whole record.

At the trial the following point for binding instructions was refused:

'Under all the evidence, your verdict should be for the defendant.' "

JAMES F. CAMPBELL,
Attorney for Defendant.

PRAECIPE SUR TRANSCRIPT.

Filed Apr. 8, 1912.

To the Clerk of the U. S. District Court E. D. of Pa.

In making up the record in the above case sur writ of error you are to include the following papers.

Docket entries.

Statement of Claim.

Plea.

Petition for an order to show cause why case should not be stricken from trial list.

Order of Court granting rule to show cause, etc.

Answer to petition.

Order refusing to strike case from trial list.

Jury—Verdict.

Bill of exceptions.

Motion for judgment n. o. v.

Opinion.

Praecepte for judgment—Judgment.

Exception.

Assignments of error.

Writ of error.

Clerk's certificate.

And no others.

JAMES F. CAMPBELL,
Attorney for Plaintiff in Error.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *sc.*

I, William W. Craig, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of the Pleas and Proceedings in the case of Lizzie M. Troxell, Administratrix, vs. Delaware, Lackawanna & Western Railroad Co., No. 1220, Oct. Sess., 1902, as per praecipe filed, a copy of which is hereto annexed, now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said District Court at Philadelphia, this 19th day of April, (Seal) in the year of our Lord one thousand, nine hundred and twelve, and in the one hundred and thirty-sixth year of the Independence of the United States.

WILLIAM W. CRAIG,
Clerk District Court U. S.

In the United States Circuit Court of Appeals for the Third Circuit,
October Term, 1912.

No. 1623.

DELAWARE, LACKAWANNA & WESTERN RAILROAD CO., Plaintiff in
Error,

vs.

LIZZIE M. TROXELL, Adm'x, Defendant in Error.

And afterwards, to wit, on the eighth and ninth days of October, 1912, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. George Gray, Hon. Joseph Buffington, and Hon. John B. McPherson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the sixth day of November, 1912, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

In the United States Circuit Court of Appeals for the Third Circuit,
October Term, 1912.

No. 1623.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY
vs.

LIZZIE M. TROXELL, Adm., Plaintiff Below.

In Error to the District Court of the United States for the Eastern
District of Pennsylvania.

Before Gray, Buffington, and McPherson, Circuit Judges.

McPHERSON, Judge:

The plaintiff's husband was a fireman in the company's service, and the injury complained of is his death in July, 1909, while at work on a train that was engaged in commerce among the states. This is the second suit, the first having also been brought in the (present) district court for the eastern district of Pennsylvania. The cause of action set up, both then and now, is "the negligence, carelessness, and oversight of said defendant, and its failure to supply and keep in good efficient condition proper, necessary, and safe devices, instruments, and apparatus (whereby) said locomotive and train came into violent collision with several loose and runaway cars, causing a wreck, whereby and wherein said Joseph Daniel Troxell lost his life."

In the first suit the plaintiff recovered a judgment, but this court reversed it (Railroad Co. vs. Troxell, C. C. A., 183 Fed. 373), and

directed judgment to be entered for the company. The plaintiff then was Lizzie M. Troxell, suing as an individual but in behalf of herself and their two children; and after her failure to recover she took out letters of administration and brought the suit that is now before us. She recovered a second judgment, and the company is again before this court, setting out numerous assignments of error to the conduct of the trial. We shall not consider them in detail; in our opinion the rule of *res judicata* applies and requires judgment to be entered for the defendant.

When the first suit came on for trial the scope of the Employers' Liability Act of 1908 had not been passed upon by the supreme court, and the circuit court did not have the benefit of the elaborate opinion delivered in the several cases reported in 223 U. S., page 1. Among the points there decided is this (p. 54):

"True, prior to the present act the laws of the several States were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employes while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the States in the absence of action by Congress. *Sherlock vs. Alling*, 93 U. S. 99; *Smith vs. Alabama*, 124 U. S. 465; 473, 480, 482; *Nashville &c. Railway vs. Alabama*, 128 U. S. 96, 99; *Reid vs. Colorado*, 187 U. S. 137, 146. The inaction of Congress, however, in no wise affected its power over the subject. *The Lottawanna*, 21 Wall. 558, 581; *Gloucester Ferry Co. vs. Pennsylvania*, 114 U. S. 196, 215. And now that Congress has acted, the laws of the States, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is. *Gulf, Colorado and Santa Fe Railway Co. vs. Hefley*, 158 U. S. 98, 104; *Southern Railway Co. v. Reid*, 222 U. S. 424; *Northern Pacific Railway Co. v. Washington*, 222, U. S. 370."

It follows, that the first suit was governed not by the law of Pennsylvania, but by the act of Congress; and indeed the statement of claim was evidently drawn from that point of view. It averred (and the present statement also avers) that;

"On or about the 21st day of July, 1909, said Joseph Daniel Troxell, the husband of said widow, Lizzie M. Troxell, was employed by said defendant corporation in the capacity of fireman on a locomotive, pulling and hauling one of said defendant's trains, carrying interstate and foreign commerce and traffic, and on and about the cars, tracks, roadbed and right of way used and employed by said defendant in its interstate and foreign commerce and traffic, on and about the Bangor and Portland Railroad Company, owned, controlled, operated and directed by said defendant, at and near the town of Belfast, Northampton County, Pennsylvania.

It is true that after the evidence had all been heard at the first trial her counsel attempted to limit the ground of the plaintiff's claim, evidently supposing that he could abandon the act of Congress, and stand upon her former rights under the law of Pennsylvania. The reason for this effort does not concern us, but it was

necessarily ineffective; for it is clear that the act of Congress had superseded the law of the state in this class of cases, and that the plaintiff could not rely on a law that had ceased to govern litigation to redress injuries suffered in interstate commerce. Evidence had been offered to prove negligence of two kinds; first, the absence of a derailing switch at the opening of Albion siding No. 2; and 2nd, the failure of Troxell's fellow servants to use care in securing the cars upon the siding by the use of brakes and blocks. The plaintiff decided to abandon the second charge—which would have been unavailable under the law of the state—altho' the act of Congress allowed her to prove and rely upon both averments. Both were embraced in the very general language of her statement of claim, and she had offered evidence in support of both. In this suit she abandons the first charge and is relying wholly upon the second; but it is plain we think that she could not confine the first action to the failure to provide a derailing switch while she held in reserve as the ground of a second suit the failure properly to secure the cars. It is not necessary to discuss this well known rule: *Lim Jew vs. U. S.* (C. C. A.) 196 Fed. 736. She is merely offering more evidence now to prove certain facts that she might have proved, but came short of proving, at the former trial: *Worrell v. Kemmerer* (C. C. A.) 192 Fed. 911, S. C. (D. C.) 185 Fed. 1002.

If, therefore, the suit now before us is between the same parties, it is based upon the same cause of action, and the rule of res judicata must be applied. In our opinion the parties are essentially the same. It is true that in form the first action was brought by Lizzie Troxell as an individual, but the statement of claim shows it to have been on behalf of herself and the two children, both of them minors. The company did not object to the form of the suit, but we cannot doubt that if objection had been made the court would have allowed an amendment so as to put her upon the record as administratrix. The statement of claim in the present action is identical with the statement in the first, except that she now sues as administratrix; but she again avers (as she did before) that she brings the action for the benefit of herself and the children. Save in mere form, both actions are for the sole benefit of the same persons, and we think the proposition that the parties do not differ cannot be made clearer by elaboration. It is true that in the ordinary case of a suit brought by an administrator he represents the estate, and of course he is then suing for the benefit of creditors as well as for the next of kin. But this is not the ordinary case: the persons for whose benefit recovery may be had are expressly pointed out by the act of Congress, so that an administrator suing under the act does not sue for the estate, but solely for the persons named. Where (as here) it otherwise appears that the proper beneficiaries are the only persons interested in the action, the omission to sue as administrator is a technical omission only, curable by amendment; the substance of the action is that the surviving parent and the children, (or the other persons named in the act), are suing—since they, and they only, are entitled to the benefit of the judgment: *R. R. Co. vs. Evans*, (C. C. A.) 188 Fed. 6. This being so, it seems

to us that the two actions are identical in all essential particulars, and that the second suit cannot be maintained.

The judgment is therefore reversed, with directions to the district court to enter judgment for the defendant.

Endorsed: No. 1623. Opinion of the court by McPherson, J.
Received and Filed November 6, 1912, Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit.
October Term, 1912.

No. 1623 (List No. 16).

DELAWARE, LACKAWANNA & WESTERN R. R. Co., Plaintiff in Error,
vs.

LIZZIE M. TROXELL, Adm'r, Defendant in Error.

In Error to the District Court of the United States for the Eastern
District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the *said* is hereby reversed, with costs, with directions to the District Court to enter judgment for the defendant.

GEO. GRAY,
Circuit Judge.

Philadelphia Nov. 6, 1912.

Endorsed: No. 1623. Order Reversing Judgment. Received and
Filed, November 6, 1912, Saunders Lewis, Jr., Clerk.

United States Circuit Court of Appeals for the Third Circuit.

LIZZIE M. TROXELL, Administratrix of the Estate of Joseph Daniel
Troxell, Deceased, Plaintiff in Error,

vs.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY.
Defendant in Error.

Assignments of Error.

And now, to wit, this 16th day of November, 1912, comes Lizzie M. Troxell, Administratrix of the Estate of Joseph Daniel Troxell, Deceased, Plaintiff in Error, and makes and files these her Assignments of Error.

First. The Circuit Court of Appeals for the Third Circuit erred

in reversing the judgment of the Circuit Court for the Eastern District of Pennsylvania.

Second. The Circuit Court of Appeals for the Third Circuit erred in directing the said Circuit Court to enter judgment in favor of the defendant.

Third. The Circuit Court of Appeals for the Third Circuit erred in not affirming the judgment of the said Circuit Court.

Fourth. The Circuit Court of Appeals for the Third Circuit erred in holding that the record in the case of Lizzie M. Troxell, individually, against The Delaware, Lackawanna and Western Railroad Company was res judicata of the issue in this case; because:

(a) Said record was not before the Circuit Court of Appeals.

(b) The judgment in said suit did not constitute res judicata of the issue in this cause.

Fifth. The Circuit Court of Appeals for the Third Circuit erred in re-examining the facts found by the jury in the said Circuit Court in the present case and embodied in the judgment entered by that Court by a method otherwise than according to the rules of the common law, to wit: by holding that a certain judgment rendered in another cause was res judicata of the issue in this cause when the said judgment and the record thereof were not part of the record in the Circuit Court of Appeals, which said act of the Circuit Court of Appeals was in violation of the Seventh Amendment to the Constitution of the United States.

GEORGE DEMMING,
Attorney for Plaintiff in Error.

Endorsed: No. 1623. Assignments of Error for Supreme Court.
Received and Filed Nov. 18, 1912, Saunders Lewis, Jr., Clerk.

United States Circuit Court of Appeals for the Third Circuit.

LIZZIE M. TROXELL, Administratrix of the Estate of Joseph Daniel
Troxell, Deceased, Plaintiff in Error,

vs.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
Defendant in Error.

Petition for Writ of Error.

To the Honorable the Justices of the Supreme Court of the United States:

Lizzie M. Troxell, administratrix, of the Estate of Joseph Daniel Troxell, the above plaintiff in error, feeling herself aggrieved by the final judgment entered against her in the above-entitled case on the 6th day of November, 1912, by the Circuit Court of Appeals for the Third Circuit, which judgment reversed a judgment of the United States Circuit Court for the Eastern District of Pennsylvania, entered in her favor in the same case on April 1, 1912, and directed judgment to be entered in favor of the Delaware, Lackawanna and

Western Railroad Company, comes now by her attorney, George Demming, Esq., and shows that the above named action was begun in the Circuit Court of the United States for the Eastern District of Pennsylvania; that the jurisdiction of such Circuit Court was not dependent entirely upon the opposite parties to the suit being citizens of different states, but that the suit arose under a law of the United States; and that petitioner is therefore entitled to a writ of error out of the Supreme Court of the United States in accordance with Section 241 of the Judicial Code. Petitioner, therefore, prays that a writ of error may be allowed to the Supreme Court of the United States, and also that an order be made fixing the amount of security for costs which the plaintiff in error shall give and furnish upon said writ of error, and that, upon giving said security, all further proceedings in this Court be suspended and stayed until the final determination of said writ of error by the Supreme Court of the United States.

And your Petitioner will ever pray.

(Signed)

LIZZIE M. TROXELL,
*Administratrix of the Estate of
Joseph Daniel Trozell, Dec'd.*

STATE OF PENNSYLVANIA,

County of Northampton, ss:

Lizzie M. Troxell, being duly sworn according to law, deposes and says that she is the plaintiff in error in the foregoing case and petition, that the statements contained in the petition are true, and that the writ of error therein prayed for is not taken out for the purpose of delay, but because she feels that an injustice has been done by reason of said judgment.

(Signed)

LIZZIE M. TROXELL.

Sworn and subscribed to before me, this the 14th day of November, A. D. 1912.

L. P. KOSTENBADER,
Justice of the Peace.

Commission Expires First Monday in January, 1918.

And now, this, the 18th day of November A. D. 1912, upon consideration of the foregoing petition and affidavit, and upon motion of George Damming, Esq., Attorney for the Plaintiff in Error, and upon filing this petition for a writ of error and assignment of errors, it is ordered that writ of error be, and it hereby is, allowed, to have review in the Supreme Court of the United States of the judgment entered herein and all the record, proceedings, etc., of the case and in any wise thereto pertaining and that a citation be issued addressed as prayed for, returnable within thirty days, hereafter, upon the entry of security in the sum of Two hundred and fifty Dollars, that a supersedeas be granted and proceedings stayed upon this writ of error.

By the Court:

JOHN B. McPHERSON,
Circuit Judge

Endorsed: No. 1623. Petition for Writ of Error for Supreme Court and Order Allowing Same. Received and Filed November 18, 1912. Saunders Lewis, Jr., Clerk.

In the Circuit Court of Appeals of the United States for the Third Circuit.

LIZZIE M. TROXELL, Adm. of the Estate of Joseph Daniel Troxell,
Dec'd, Appellant,

vs.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD CO.,
Appellee.

Know all Men by these Presents, That I, Lizzie M. Troxell, Administratrix of the Estate of Joseph Daniel Troxell, Deceased, and the Fidelity & Deposit Company of Maryland, are held and firmly bound unto The Delaware, Lackawanna & Western Railroad Company, a corporation, its successors, or assigns, in the sum of Two Hundred and Fifty dollars, lawful money of the United States of America, to be paid unto the said The Delaware, Lackawanna & Western Railroad Company, its successors, or assigns, to which payment well and truly to be made. We do bind and oblige ourselves, our heirs, executors, and administrators, joint and severally by these presents.

Sealed with our seal and dated this 19th day of November, A. D., 1912.

Whereas, the above named Lizzie M. Troxell, Administratrix of the Estate of Joseph Daniel Troxell, Deceased, heretofore a citizen of the States of Pennsylvania and New Jersey, commenced an action of appeal in the Circuit Court of Appeals of the United States, in and for the Eastern District of Pennsylvania, in the Third Circuit, against the said The Delaware, Lackawanna & Western Railroad Company, a corporation:

Now therefore the condition of this obligation is such that if the above named Lizzie M. Troxell, Administratrix of the Estate of Joseph Daniel Troxell, Deceased, in the said action of appeal shall pay on demand, all costs that may be adjudged, or awarded against her as aforesaid in said action of appeal; then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

Signature of appellant waived by Surety.

FIDELITY & DEPOSIT COMPANY OF
MARYLAND
HERMAN HOOPES,

Resident Vice-President.

Attest:

E. HILL,

Resident Assistant Secretary.

Sealed and Delivered in the presence of—

Approved Nov. 19, 1912.

JOHN B. McPHERSON, *Judge.*

Endorsed: No. 1623. Bond. Received and Filed Nov. 19, 1912.
Saunders Lewis, Jr., Clerk.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals, before you, or some of you between Lizzie M. Troxell, Administratrix of the Estate of Joseph Daniel Troxell, Deceased, Plaintiff in Error, and Delaware, Lackawanna & Western Railroad Company Defendant in Error, a manifest error hath happened, to the great damage of the said Lizzie M. Troxell, as by her complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same within thirty days, in the said Supreme Court of the United States, at the City of Washington, District of Columbia, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, at Philadelphia, the 18th day of November, in the year of our Lord one thousand nine hundred and twelve.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk United States Circuit Court of
Appeals for the Third Circuit.

Allowed.

By the Court:

JOHN B. McPHERSON, Judge.

UNITED STATES OF AMERICA, ss:

The President of the United States to Delaware, Lackawanna and Western Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the City of Washington, District of Columbia, within thirty days, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the United States, wherein Lizzie M. Troxell, Administratrix, of the Estate of Joseph Daniel Troxell, Deceased, is Plaintiff in Error, and

you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Judge of the Supreme Court of the United States, at Philadelphia, the 18th day of November, in the year of our Lord one thousand nine hundred and twelve.

JOHN B. McPHERSON, *Judge.*

Service of the within citation is hereby accepted, this 20th day of November, 1912.

JAMES F. CAMPBELL,
*Of Counsel for Delaware, Lackawanna
and Western R. R. Co., Defendant.*

[Endorsed:] Lizzie M. Troxell, Adm'r'x, vs. D., L. & W. Railroad Co. Citation.

UNITED STATES OF AMERICA,
*Eastern District of Pennsylvania,
Third Judicial Circuit, act:*

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this Court, in the case of Delaware, Lackawanna & Western Railroad Company, Plaintiff in Error, and Lizzie M. Troxell, Administratrix of the Estate of Joseph Daniel Troxell, Deceased, No. 1623, (List No. 16) October Term, 1912, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof I have hereunto subscribed my name and affixed the seal of the said Court at Philadelphia, this 21st day of November, in the year of our Lord one thousand nine hundred and twelve, and of the Independence of the United States the one hundred and thirty-seventh.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
*Clerk of the U. S. Circuit Court of
Appeals, Third Circuit.*

Endorsed on cover: File No. 23,429. U. S. Circuit Court Appeals, 3d Circuit. Term No. 854. Lizzie M. Troxell, administratrix of the estate of Joseph Daniel Troxell, deceased, plaintiff in error, vs. Delaware, Lackawanna & Western Railroad Company. Filed November 23d, 1912. File No. 23,429.